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## CHOICE OF LAW METHODOLOGY IN THE RESTATEMENT, SECOND, CONFLICT OF LAWS<sup>†</sup>

Hiroshi MATSUOKA\*

Choice of law methodologies are being most vigorously discussed in the United States. The impact of American methodologies on the choice of law thinking of other countries is very strong and will become much stronger in future. This article will examine the choice of law methodology in the Restatement, Second, Conflict of Laws, which is one of the most important methodologies at least from the international perspective. Principal emphasis is on (1) the policy considerations which the Restatement Second looks on as significant factors in determining choice of law problems, and (2) the possibility or desirability of formulating definite and precise rules at the present stage of development of choice of law. In doing so, it seems appropriate to refer to the methodology of Professor Reese, because the central framework or underlying philosophy of the Restatement is that of the Reporter. Advisers, the Council and the Institute membership do not themselves do any of the original writing but only criticize and make suggestions and then ultimately either approve or reject.<sup>1)</sup>

The American Law Institute commenced revision of the Restatement, Conflict of Laws in 1951. Professor Reese, Columbia Law School, was appointed as the Reporter. After the long preparations and discussions, the final Official Draft was approved for publication by the American Law Institute at the Annual Meeting of 1969 and was published in 1971. The Restatement, Second is far more than a current version of the First Restatement of Conflict of Laws published in 1934. It is rather a fresh treatment

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\* Associate Professor of Private International Law, Faculty of Law, Osaka University, Visiting Scholar, Harvard Law School, 1974 – 76.

1) Reese, "Discussion of Major Areas of Choice of Law", *Academie de Droit International*: 111 *Recueil des Cours*, 312, 320 (1964–I).

of Conflict of Laws "in basic analysis and technique, in the position taken on a host of issues, in the elaboration of the commentary and addition of Reporter's Notes."<sup>2)</sup> It was written during the time of turmoil of American Conflict of Laws. Where this revolution will lead us as yet unclear. The Restatement Second itself does not mark the end of the road.<sup>3)</sup> Nevertheless, the Restatement Second is having and will have an enormous impact on American choice of law.

### I Choice of Law Principles in the Restatement, Second

According to Professor Reese, all rules of law, and choice of law rules are no exception, are the product of policies.<sup>4)</sup> It is all-important to identify the basic policies that underlie the area. Choice of law rules should be the product of these policies.<sup>5)</sup> Therefore, it is the policy which first comes to light.<sup>6)</sup> What are the basic policies which underlie the choice of law rules of the Restatement Second? In other words, what are the basic factors which should guide a court in deciding choice of law questions and formulating rules for choice of law? This is stated in Restatement, Second, Conflict of Laws § 6.

#### § 6 Choice of Law Principles

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  - (a) the needs of the interstate and international systems,
  - (b) the relevant policies of the forum,
  - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

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2) Restatement, Second, Conflict of Laws vii (1971) (Introduction by Professor Wechsler).

3) Reese, 72 Colum. L. Rev. 219 (1972) (Forward to the Symposium on the Restatement (Second) of Conflict of Laws.)

4) Reese, "Conflict of Laws and the Restatement Second," 28 Law & Comtemp. Prob. 679, 681 (1963).

5) Reese, *supra* note 1, at 340.

6) Reese, "Choice of Law : Rules or Approach," 57 Cornell L. Rev. 315, 318 (1972).

- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

The basic factors in § 6 which a court should consider in deciding the applicable law, are much the same as the basic policies that Professor Cheatham and Professor Reese enumerated in their article in 1952 entitled "Choice of the Applicable Law".<sup>7)</sup> These policies are reproduced in the later article of Professor Reese and in his lectures at Hague Academy.<sup>8)</sup> Only two of his ten original policies have been abandoned in the Restatement Second § 6. These are (a) the policy that the court should apply its own local law unless there is good reason for not doing so and (b) the policy that the court should seek to attain justice in the individual case. Although why these two policies were eliminated is not clear,<sup>9)</sup> we can conclude that the Restatement, Second, Conflict of Laws, basically adopted the methodology of Professor Reese, the Reporter of the Restatement Second.

Some of the policies in § 6 (2), especially § 6 (2)-(b) and (c) were almost completely neglected in the First Restatement, in which simplicity and uniformity were the dominant policies in deciding choice of law problems. These policies may require a court to examine the content and policies of the relevant local law rules of the interested states. And this may impose heavy burdens on the court, as we will see later, but it produces appropriate

7) 52 Colum. L. Rev. 959 (1952).

8) These policies are:

(1) The Court must follow the dictates of its own legislature provided that these dictates are constitutional; (2) Choice of Law rules should be designed to make the international and interstate systems work well; (3) The court should apply its own local law unless there is good reason for not doing so; (4) The court should consider the purpose of its relevant local law rule in determining whether to apply its own law or the law of another state; (5) Choice of law rules should seek to achieve certainty, predictability and uniformity of result; (6) The court should seek to apply the law of the state of dominant interest; (8) Choice of law rules should be simple and easy to apply; (9) The court should seek to further the fundamental policy underlying the local law field involved; (10) The court should seek to attain justice in the individual case. Reese, *supra* note 4, at 682 - 690; Reese, *supra* note 1, at 340 - 353.

9) According to Dr. Morris, presumably because these two policies did not find favor with the Institute. He says that few will mourn the dropping of these two. Morris, Book Review, "Law and Reason Triumphant or How Not to Review a Restatement," 21 Am. J. Comp. L. 322, 323 (1973).

solutions of choice of law problems which were often sacrificed in favour of simplicity and uniformity of result under the system of the First Restatement.<sup>10)</sup>

There are many factors in § 6, and it may be helpful to reduce them to a more manageable number. According to the Comment b to § 145, the factors listed in Subsection (2) of the rule of § 6 can be divided into five groups. One group is concerned with the fact that in multistate cases it is essential that the rules of decision promote mutually harmonious and beneficial relationships in the interdependent community, federal or international (§ 6(2)-(a)). The second group focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors in this second group are at times referred to as "state interests" or as appertaining to an "interested state" (§ 6(2)-(b), (c)). The third group involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result. (§ 6(2)-(d), (f)). The fourth group is directed to implementation of the basic policies underlying the particular field of law, such as torts or contracts

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10) See von Mehren "The Renvoi and Its Relation to Various Approaches to the Choice of Law Problem," *xxth Century Comparative and Conflicts Law* 380, 385 (1961). According to Professor von Mehren, the important policies under the systems of the First Restatement were simplicity, uniformity and the avoidance of forum shopping. *Id.*, see also, von Mehren and Trautman, *The Law of Multistate Problems*, 60-65, 482-86, 512-13 (1965).

Professor von Mehren also suggests that choice of law rules should be responsive to at least two fundamental objectives: first, choice of law rules must provide the most appropriate or apt solution which can achieve "a wise and just accomodation of the interests of the various concerned communities" and take into account "the legitimate expectations of the persons involved"; and second, choice of law rules seek to ensure uniformity of outcome regardless of the forum. In his view, the notion of aptness is today clearly almost universally viewed as the stronger policy, and the Restatement Second § 6 is an example which reflects the preference for apt solutions to decisional harmony. von Mehren, "Special Substantive Rules For Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology," 88 *Harv. L. Rev.* 347, 349-355 (1974).

However, according to his opinion, the Restatement Second does not suggest any principled basis, for example, to resolve the clash between policies underlying specific domestic rules, and more general policy of certainty, predictability and uniformity of result. The need for additional guidance is felt, but what is offered takes the somewhat evasive form of "a secondary statement in black letter setting forth the choice of law the courts will 'usually' make in given situations". So Professor von Mehren concludes that the Restatement Second does not resolve the difficulties and tensions that policy-based approaches encounter. von Mehren, "Le Second 'Restatement of the Conflict of Laws'" 101 *Journal du droit international* 815, 818 (1974). See, also, von Mehren, "Recent Trends in Choice of-Law Methodology," 60 *Cornell L. Rev.* 927, 963 - 64 (1975).

(§ 6(2)-(e)), and the fifth group is concerned with the needs of judicial administration, namely with ease in the determination and application of the law to be applied (§ 6(2)-(g)). These policies can also be divided into two groups from another point of view. One group is basically directed to the various domestic law policies (§ 6(2)-(b), (c), (e)). The other group is concerned with the policies deriving from the fact that the situation involves more than one jurisdiction (§ 6(2)-(a), (d), (f)).<sup>11)</sup>

The Restatement Second does not mention false conflicts. So it is not clear whether these policy considerations are also applied to false conflict cases as well as true conflict cases. However, a very interesting statement can be found in Comment i to § 145. It reads: "When certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state." This means that when the relevant laws of the states involved are the same, there is no conflict between the laws. When there is no conflict between the laws, there is no need to make a choice of law.<sup>12)</sup> That approach is undoubtedly one way of eliminating so-called false conflicts. It seems to me that the choice of law principle in § 6 will be applied to all multistate situations except the situation stated above, whether they involve with false conflicts or not.

The methodology of the Restatement Second has a great resemblance to Professor Leflar's "choice-influencing considerations".<sup>13)</sup> Leflar himself wrote in his article that the list of the Restatement Second § 6 would be substantially complete, if the policy of applying the better rule of law were

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11) Trautman, "Chronique de jurisprudence des Etats-Unis d'Amerique" 102 *Journal du Droit International* 371, 372 (1975); Reese, *supra* note 6, at 322.

12) Leflar, "The Torts Provisions of the Restatement (Second)," 72 *Colum. L. Rev.* 267, 274-275 (1972). See also generally, Ehrenzweig, "False Conflicts and the Better Rule: Threat and Promise in Multistate Tort Law," 53 *Va. L. Rev.* 847 (1967); Leflar, "True 'False Conflicts' et Alia," 48 *B. U. L. Rev.* 164 (1968).

13) Professor Leflar lists five choice-influencing considerations. The list is shorter than that of the Restatement. It embraces the following factors: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; (5) application of the better rule of law, Leflar, *American Conflicts Law* 241-265 (1968).

added.<sup>14)</sup> Leflar's choice-influencing considerations may be easier to apply than Restatement Second § 6. Although the better-law approach should be taken into account in explaining decisions, and the influence of the better law in choice of law has been recognized as an inevitable psychological reaction in marginal cases,<sup>15)</sup> better rule of law can not be accepted in its original form. The concept of the better rule is too flexible and the better law is often difficult to find, unless objective standards of the better rule can be made clear. It will also serve courts as a pretext for applying its own law.

Probably the most important question is the way in which courts will take into account the factors listed in § 6 in deciding the governing law. In the Comments to § 6 there is no definite guide as to the way particular choice of law problems should be determined in the light of these factors and what degree of importance or weight should generally be given to each factor. It is only suggested in Comment c to § 6 that varying weight will be given to a particular factor or to a group of factors in different areas of choice of law. For example, the policy in favor of effectuating the relevant policies of the state of dominant interest (6(2)-(c)) is presumably given predominant weight in the rule that transfers of interest in land are governed by the law that would be applied by the courts of situs (§ 223-243). On the other hand, the policies in favor of protecting the justified expectations of the parties (§ 6(2)-(d)) and of effectuating the basic policy underlying the particular field of law (§ 6(2)-(e)) come to the fore in the rule that the parties can choose the law to govern their contract subject to certain limitations (§ 187).

Thus, in formulating choice of law rules, it is necessary for the court to determine what policy or policies should be given dominant weight in a

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14) Leflar, *supra* note 12, at 271-72. Some courts have followed Professor Leflar's choice-influencing considerations approach. *Clark v. Clark*, 107 N. H. 351, 222 A. 2d 205 (1966); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N. W. 2d 579 (1968); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N. W. 2d 466 (1968); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N. W. 2d 664 (1967); *Woodward v. Stewart*, 243 A. 2d 917 (1968); *Mitchell v. Craft*, 211 So 2d 509 (Miss. 1968); *Milkovich v. Saari*, 203 N. W. 2d 408 (1973). It is interesting to note that in these cases, the courts applied the forum's law as the better rule of law. See Cavers, Conflict of Laws Round Table, "The Value of Principled Preferences," 49 Tex. L. Rev. 211, 215 (1971).

15) Cavers, *supra* note 14 at 215.

particular choice of law field. Each chapter in the Restatement Second tries to identify them, but it seems to me in general that application of the law of the state with dominant interest is actually given the greatest priority in the Restatement Second (see § 6 Comment f). Another important question in formulating choice of law rules is how the court accommodates the policies in § 6 when they point, as they often do, in different directions. Choice of law rules should represent these conflicting policies. Therefore, the effectiveness of the methodology of § 6 principally depends on whether black letter rules, comments, or illustrations of various chapters in the Restatement Second can afford the court the best information on these points. Each section of the Restatement Second tries to state some additional guides as to the way in which the court should take into account the policies of § 6 in each choice of law field. However, it seems to me that the effort is not so successful.

Choice of law is, according to Professor Reese, still an undeveloped area and it can not be said that there is always agreement on what choice of law policies are entitled to the greatest weight in each particular field and how to accommodate conflicting policies. Therefore, various kinds of rules have been deduced on the basis of § 6 of the Restatement Second. In some fields, according to Professor Reese, it is possible to formulate definite and precise rules because there is agreement on these points. In other areas, for the lack of such agreement, we can not present definite rules and have to be satisfied with an approach. In these areas, the court must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them (§ 6, Comment c). I think it is possible and useful to classify the provisions of the Restatement, Conflict of Laws from this standpoint, that is, "rules or approach". The remaining part of this article will be directed to this problem.

## II Definite Rules or the Most Significant Relationship Approach

### 1. Definite Rules

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16) Restatement, Second, Conflict of Laws § 223, Comment a (1971).



First, the field where definite and precise rules are formulated in the Restatement Second, will be examined. The most typical example is found in the provisions on property, especially land. § 223(1) provides that whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the court of situs. Comment a of the Section explains that the rule is derived from those principles looking to furtherance of the needs of the interstate and international systems, application of the law of the state of dominant interest, protection of justified expectations, certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied.<sup>16)</sup> This rule is sufficiently precise to permit the courts to apply it in the decision of a case without reference to the factors which underlie it (§ 6 Comment c). This is because almost all the choice of law considerations point in the same direction, that is, the application of the whole law of the situs. These simple, broad and all-embracing rules were very common in the Restatement First. In the Restatement Second, however, they are rather exceptional. According to Professor Reese, in the article in 1963, by and large, fairly definite choice of law rules are stated with respect to status, corporations and property.<sup>17)</sup> But in Comment c, § 6 of the Restatement Second Proposed Official Draft, which was published in 1967, status was eliminated from the list, and finally the 1971 Official Draft also struck out corporations. Therefore, the only chapter 9 (property) remained as an area in which definite rules can be stated. This shows that the antipathy against the rules of the First Restatement, especially in contracts and torts which are simple, broad and all-embracing, has spread and extended over the other choice of law fields. But Dr. Morris expressed his surprise why more definite and precise rules were not laid down in the chapter on status especially marriage.<sup>18)</sup>

In any event, definite rules are not generally adopted in the Restatement Second, especially in tort and contract. According to Professor Reese the choice of law rules in the First Restatement were bad in two respects. First,

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17) Reese, *supra* note 4, at 694.

18) Morris, *supra* note 9, at 327.

they did not properly give effect to the policies involved. They are derived from the vested rights theory, which gives little consideration to the multistate and local law policies that are likely involved in a choice of law question in tort and contract.<sup>19)</sup> Second, they are too broad and all-embracing. According to Professor Reese, bad rules may well be worse than no rule at all. There are many different kinds of contracts and a vastly greater multitude of issues relating to contracts. Experience has shown that these large and complicated areas cannot adequately be handled by a few simple rules.<sup>20)</sup> What is needed instead is a large number of rules that are each directed to a relatively narrow situation.<sup>21)</sup> Experience to date is not sufficient to permit the formulation of many such rules. Courts and writers should attempt to formulate such good rules. And indeed, the task has been begun. A handful of narrow choice of law rules which have the overwhelming support of the courts have been developed. For instance, issues relating to details of performance of a contract are determined by the local rule of the place of performance (§ 206). This is an example of precise and definite rules.<sup>22)</sup> And other rules have been suggested in isolated decisions and legal articles.<sup>23)</sup> However, generally speaking, at the present time, it is impossible to formulate narrow and precise rules in every choice of law field.

## 2. The Most Significant Relationship Approach

Pending the development of rules, the courts should look in each case to

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19) Reese, *supra* note 6, at 320.

20) *Id.*, at 320. However, according to Professor Reese, this does not mean that simple and all-embracing choice of law rules can not be defended. There may be other situations where application of a simple, all-embracing rule of choice of law is supported by an overriding need for uniformity of result. This is the prime justification of the rule that issues of succession to movables are determined by the law of the state where the decedent was domiciled at the time of his death (§ 260).

21) Reese, *supra* note 4 at 698. These narrow choice of law rules which are directed to, at most, only a relatively few issues, will require that two or more issues involved should each be determined by the rules of different states. See generally, Reese, "Dépeçage: A Common Phenomenon in Choice of Law," 73 Colum. L. Rev. 58 (1973).

22) Reese, *supra* note 6 at 321, 327. It seems to me that other examples of these narrow and precise rules in the Restatement Second can be seen in the provisions of § 169, § 184, § 203 and § 269.

23) Reese, *supra* note 6 at 321. He cites Judge Fuld's concurring opinion in *Tooker v. Lopez*, 24 N. Y. 2d 569, 585, 249 N. E. 394, 404, 301 N. Y. S. 2d 519, 532-33 (1969), and Professor Rosenberg's opinion, *Comments on Reich v. Purcell*, 15 U. C. L. A. L. Rev. 641, 646-647 (1968).

the basic policies involved and strive to reach the result that would best implement these policies. In such situations we can only apply an approach. It is doubtful whether we are now in a position to frame many good choice of law rules in either tort or contract.<sup>24)</sup> Both fields are vast and many segments remain relatively unexplored. The most typical example of this approach can be found in § 145.

#### § 145 The General Principle

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
  - (a) the place where the injury occurred,
  - (b) the place where the conduct causing the injury occurred,
  - (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
  - (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The rule of this Section states a principle applicable to all torts and to all issues in tort (§ 145 Comment c). The black letter rule and the accompanying comments are phrased in terms of great generality and will not give the courts a ready-made solution to any particular case. It is believed, however, that the rule and the comments state the basic factors to be considered and thus provide the tool for the fashioning of satisfactory rules of choice of law.<sup>25)</sup> In this sense, this is not a rule in a strict meaning, which

24) Reese, *supra* note 1, at 399.

25) *Id.*, at 399. As to the torts provisions of the Restatement Second, see, Leflar, *supra* note 12; Comment, "The Second Conflicts Restatement of Torts: A Caveat," 51 Calif. L. Rev. 763 (1963); Ehrenzweig, "The Most Significant Relationship in the Conflict of Laws of Torts — Law and Reason versus Restatement Second," 28 Law & Comtemp. Prob. 700 (1963).

once applied will lead the court to a conclusion. It is an approach as well as § 6, and this approach is usually called "the most significant relationship approach."

The factors listed in § 6(2) vary somewhat in importance from field to field. It is said that the important factors in tort are the needs of interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states, and ease in the determination and application of the law to be applied.<sup>26)</sup> This means that a court usually needs to consider only these policies in determining the state of the most significant relationship under the principles stated in § 6. However, we can not say that these important policies are clearly reflected in the black letter rule of § 145 and the accompanying comments. Furthermore, it is difficult to understand why the factor of ease in the determination and application of the law is so important in tort, because the application of the most significant relationship approach is not so easy and simple to apply. It seems to me that the relevant policies of the forum and other interested states are actually given the greatest weight in the Comments to § 145.

The concerned jurisdictions which should be taken into account in applying § 6 to determine the applicable law in torts are stated in § 145(2) (a)–(d). The question is the way in which courts will consider the relative importance of these concerned jurisdictions in determining the state of the most significant relationship. According to Comments to § 145, the relative importance of these contacts depends on three elements.<sup>27)</sup> The first element is the purpose of a tort law. For example, if the primary purpose of the tort law involved, is to deter or punish misconduct, as may be true of rules permitting the recovery of damages for alienation of affections, the state where the conduct took place, may be the state of the dominant interest. On the other hand, when the tort rule is designed primarily to compensate the victim, the state of injury may have the greatest interest in the

26) Restatement, Second, Conflict of Laws § 145, Comment b (1971).

27) § 379-(3) (now § 145-(2)) of the Tentative Draft clearly stated: "In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort and relevant purposes of the tort rules involved."

matter, at least if the victim lives there. But it is not always necessary to examine the purpose of the rule. Comment c states that it is frequently unnecessary to examine the content of the rule of the interested states. This will be so whenever by reason of the particular circumstances one state is obviously that of the applicable law. However, we can not find any explanation about what these particular situations are. The second element is the issue involved. For example, the issue involving standards of conduct will be determined by the law of the state of injury and conduct. On the other hand, the issue of intra-family immunity is usually determined by the law of the state of the spouses' common domicile. Thirdly, the relative importance of the contacts mentioned in § 145(2) varies somewhat with the nature of the tort involved. Thus, the place of injury is of particular importance in the case of personal injury (§ 146). On the other hand, the principal location of the defendant's conduct is the most single important contact in the case of interference with marriage relationship (§ 154).

Thus, we can say that § 145 is not a rule in a strict sense. It only states what factors should be considered in arriving at a conclusion. Though it is a little more concrete than § 6, it is still basically an approach. However, it is stated in Comment e that when the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort. This statement may be contrary to the basic approach which emphasizes the importance of the purposes of the law involved and the particular issue.<sup>28)</sup>

Much the same approach has been taken in § 188 which states the applicable law for contract in the absence of effective choice by the parties.<sup>29)</sup> Subsection (1) of that section provides that the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6. The policy of the protection of the parties is one of the important

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28) See Weintraub, *Commentary on the Conflict of Laws* 210 (1971).

policies in contracts whereas it is of little importance in torts.<sup>30)</sup> However, the relative importance of that policy varies somewhat from issue to issue. It is of considerable importance when an issue of validity of a contract, such as the formality required to make a valid contract, is at issue. The parties will usually expect that the provisions of the contract will be binding on them. Therefore, their expectations should not be disappointed by applying the law which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with an invalidating rule in having this rule applied. On the other hand, when an issue involves the nature of the obligations imposed by a contract upon the parties, protection of justified expectations of the parties may play a less significant rule in the choice of law process.<sup>31)</sup>

Other important policies in the contract area of choice of law are the policies of the potentially interested states and the relative interests of those states in the determination of the particular issue.<sup>32)</sup> The states which are most likely to be interested are those which have one or more of the contacts stated in § 188(2). These factual contacts with the transaction and the parties are to be evaluated according to their relative importance with respect to the particular issue. Therefore, we can say that the importance of both the purposes of the relevant laws and the particular issue involved is emphasized in the determination of the state of the most significant relation-

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29) When the parties have chosen the law that will govern their contractual rights and duties, the law will be applied, subject to certain limitations (§ 187). This recognition of party autonomy is one of the most important changes in the contract chapter of the Restatement Second. See Reese, *supra* note 1, at 368-74.

With respect to the contracts provisions of the Restatement Second, see Reese, "Contracts and the Restatement of Conflict of Laws, Second," 9 Int'l & Comp. L. Q. 53 (1960). Reese, *supra* note 1, at 366-385; Cavers, "Re-restating the Conflict of Laws: The Chapter on Contracts," xxth Century Comparative and Conflicts Law 349 (1961); Weintraub, "The Contracts Proposals of the Second Restatement of Conflict of Laws - A Critique," 46 Iowa L. Rev. 713 (1961); Leflar, "Conflict of Laws, Contracts and the New Restatement," 15 Ark. L. Rev. 163 (1961); Szold, Comments on Tentative Draft No. 6 of the Restatement (Second) Conflict of Laws - Contracts, 76 Harv. L. Rev. 1524 (1963); Braucher, Impromptu Remarks, 76 Harv. L. Rev. 1718 (1963); Sedler, "The Contracts Provisions of the Restatement (Second): An Analysis and a Critique," 72 Colum. L. Rev. 329 (1972).

30) Restatement, Second, Conflict of Laws § 188, Comment c (1971).

31) *Id.*

32) Restatement, Second, Conflict of Laws § 188, Comment c (1971).

ship.<sup>33)</sup> In this sense, the approach taken in § 188 is essentially the same as § 145 discussed above.

However, as some commentators suggest,<sup>34)</sup> § 188 may be seen to have some aspects of a jurisdiction-selecting rule. It is said as well as in torts that it is frequently not necessary to pay deliberate attention to the purpose sought to be achieved by the relevant contract rules of the interested states. This will be so whenever by reason of the particular circumstances one state is obviously that of the applicable law. But, there is no explanation of what the particular circumstances are. Moreover, if the place of negotiation and the place of performance are the same, that state will usually be the state of most significant relationship (§ 188(3)), because a state having these contacts will usually be the state that has the greatest interest in the determination of issues arising under the contract (Comment f). However, it is somewhat difficult to imagine the situations in which a state can be the state of the most significant relationship without knowing the contents and purposes of the relevant laws of that state.<sup>35)</sup> At any event, as far as these expressions are concerned, the rule of § 188 is framed in terms of factual contact and not based on the policy-oriented approach. This is true of all sections, but § 6 is always involved.

### 3. Rules or Approach

It seems appropriate here to examine the question whether we should have rules or approach. According to Professor Reese, this is the principal question in choice of law today.<sup>36)</sup> Rules are employed in most areas of law. The advantages that rules bring are certainty and predictability, and the

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33) Professor Cavers suggested in an article written in 1961 that the Restatement Second should make clear that the relevance and importance of the contacts can only be determined in the light of the particular issue before the court. He further suggested that the Restatement should point out that determination of the state of most significant relationship can not be made without giving consideration to the contents and purposes of the relevant local law rules of the interested states. Cavers, *supra* note 29, at 356-57. The black letter rule and comments of 332(b) (now § 188) were amended to incorporate these suggestions, Reese, *supra* note 1, at 378. They are also reflected in the torts provisions of the Restatement Second. *Id.*, 394. See *supra* 10.

34) Sedler, *supra* note 29, at 298-99; Weintraub, *supra* note 28, at 277.

35) Cavers, *supra* note 29, at 356; Weintraub, *supra* note 28, at 277.

facilitation of the judicial task. On the other hand, the task of a judge is peculiarly difficult when he is told without further direction to apply the law of the state with the greatest concern in the decision of the particular issue. There are four disadvantages in using only an approach and not rules. They are: (1) the difficulty of ascertaining what policies underlie the relevant laws of potentially interested states, (2) the difficulty of defining the policy to the point of being able to determine whether it would or would not be furthered by the rule's application in a case involving foreign facts, (3) the difficulty of determining which of the states involved is that of primary concern, and (4) if the court were to find that two or more of these policies were approximately equal strength, the further problem of determining why one of these policies should be furthered at the expense of the other.<sup>37)</sup>

Professor Reese continues that the difficulties involved in applying the law of the state with the greatest concern in the decision of the particular issue are well illustrated by the experience of the New York Court of Appeals. He cites a series of decisions of the New York Court of Appeals since *Babcock v. Jackson*.<sup>38)</sup> He furthermore insists that in at least most areas of law, the constant aim of courts has been to translate policies into rules as quickly as possible, because rules are more precise and hence provide greater certainty and predictability and are also far easier for the courts to apply. The development of rules should be as much as an objective in choice of law as it is in other areas. Professor Reese concludes we should have rules.<sup>39)</sup> We should have narrow and definite rules which are based on

36) Reese, *supra* note 6, at 315. Professor Rosenberg also says: "The disagreement today is whether any choice-of-law rules can be fashioned, however narrow, and however sensitive to the importance of taking into account of the contents of the rejected and the chosen laws. I believe that useful rules can be drawn." Rosenberg, Comment on *Reich v. Purcell*, 15 U.C.L.A.L. Rev. 641, 642 (1968). See generally, Cramton, Currie and Kay, *Conflict of Laws* 352-359 (2d ed. 1975); Reese and Rosenberg, *Conflict of Laws* 603-604 (6th ed. 1971); von Mehren and Trautman, *supra* note 10, at 299-304.

37) Reese, *supra* note 6, at 317-18. See also, Rosenberg, *Two Views on Kell v. Henderson*, 67 Colum. L. Rev. 459, 464 (1967).

38) *Babcock v. Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279, 240 N. Y. S. 2d 743 (1963); *Miller v. Miller*, 22 N. Y. 2d 12, 237 N. E. 2d 877, 290 N. Y. S. 2d 734 (1968); *Macey v. Rezbicki*, 18 N. Y. 2d 289, 221 N. E. 2d 380, 274 N. Y. S. 2d 591 (1966). Reese, *supra* note 6, at 318.

39) Reese, *supra* note 6, at 319



proper choice-of-law considerations. A good choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results. Good rules, like other advantages, have their price.<sup>40)</sup>

This position was supported in *Neumeier v. Kuehner*. The New York Court of Appeals questioned the utility of interest analysis and turned to "narrow choice of law rules". Chief Judge Fuld, speaking for the court, stated:

When, in *Babcock v. Jackson* (citation omitted), we rejected the mechanical place of injury rule in personal injury cases because it failed to take account of underlying policy considerations, we were willing to sacrifice the certainty provided by the old rule for the more just, fair and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has greatest concern with, or interest in, the specific issue raised in the litigation (citation omitted). In consequence of the change effected — and this was to be anticipated — our decisions in multi-state highway accident cases, particularly in those involving guest-host controversies, have, it must be acknowledged, lacked consistency. This stemmed, in part, from the circumstance that it is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of the others.

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40) Reese, *supra* note 6, at 322, 334. See also Professor Rosenberg's statement. He says; "While I would not want to be understood as saying that a bad rule is better than no rule at all, I do assert that a choice of law rule need not achieve perfect justice every time it is invoked in order to be preferable to the no-rule approach." Rosenberg, *supra* note 36, at 644.

On the contrary, Professors von Mehren and Trautman say: "The problem of balancing the various multistate policies deriving from state interests and interests of individuals may be a difficult one, and certainly no formulation of criteria in the abstract, unrelated to particular factual contexts, seems to be meaningful at this stage of the development of the law." von Mehren and Trautman, *supra* note 10 at 299. They further suggest: "Although rules ought to be as simple as possible, workable rules — rules that provide satisfactory and rational solutions — often must be complex. The complexity inheres in the problem to which rules are directed." "The mere simple rule which produces irrational results is not worth the price paid." *Id.* at 303-04.

The single all-encompassing rule which called, inexorably, for selection of the law of the place of injury was discarded, and wisely, because it was too broad to prove satisfactory in application. There is, however, no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and experience.<sup>41)</sup>

Judge Fuld then referred to his concurring opinion in *Tooker v. Lopez*, in which he stated three principles for deciding guest statute cases, and these three principles were adopted by the majority in *Neumeier*. Though no one can dispute the desirability of simplicity and predictability, it is somewhat doubtful whether the principle adopted in *Neumeier*, especially rule 1, is a happy one.

It is important to note that Professor Reese's position taken here is somewhat different from that of the Restatement Second with respect to two points. First, Comment f to § 6 stated: "In general, it is fitting that the state whose interests are most deeply affected should have its local law

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41) *Neumeier v. Kuehner*, 31 N. Y. 2d 121, 127 (1972). Three principles which were adapted by the majority in *Neumier* are:

"1. When the guest- passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

"2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not – in the absence of special circumstances – be permitted to interpose the law of his state as a defense.

"3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.

*Id.*, at 128. As to this case, see Symposium, *Neumeier v. Kuehner*: A Conflicts Conflict, 1 Hofstra L. Rev. 93 (1973).

Another recent example which stands much the same position can be found in *First National Bank in Fort Collins v. Rostek*, 514 P. 2d 314 (Colo. 1973). In this case, the first two principles of *Neumeier* were adopted.

applied.” This seems to suggest that application of the law of the state with the dominant interest is the single, most important factor in the entire system of choice of law of the Restatement in general. However, Professor Reese now holds the position that application of greatest concern is only one of several choice of law policies and not necessarily the most important. Second, the Comments to § 6 stated:

i Predictability and uniformity of result. These are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules. . . .

j Ease in the determination and application of the law to be applied. Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results.

On the other hand, as we have already seen, somewhat greater emphasis is now placed on the policies of certainty, predictability and ease of application by Professor Reese in order to avoid *ad hoc* decisions and to formulate definite and precise rules. It can be said that these attitudes are based on the idea that the judicial decisions since *Babcock v. Jackson* have not always produced satisfactory results.

In any event, according to Professor Reese, we should try to formulate definite and precise rules. And he suggests some examples of these good rules. It seems that there are two kinds of good rules. In some situations, the law of a particular state may be applied because the state is that of greatest concern by reason of a particular contact irrespective of all other considerations including the content of its relevant local law.<sup>42)</sup> Such rules may be found in § 206 and § 223 as we have already seen.<sup>43)</sup> And he also suggests a rule that the law of the common domicile of guest and host driver

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42) Reese, *supra* note 6, at 326-27.

should be applied to determine whether the guest should be required to show more than ordinary negligence in order to recover from the host.<sup>44)</sup> I can not examine here whether these jurisdiction-selecting rules work well in the great majority of situations. I only indicate that there are some strong dissents against formulating this kind of jurisdiction-selecting rule.<sup>45)</sup>

Professor Reese admits that there are not so many issues as to which one state will be that of greatest concern by reason of a particular contact alone. There will be other issues as to which a state will, in the great majority of situations, occupy this position if in addition to a particular contact, it has a particular local law rule.<sup>46)</sup> For example, the state where a person acts

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43) See *supra* 7-8. However, according to Professor Leflar, the hard-and-fast situs rule on land can not be justified. He suggests that a forum which is the domicile of all the parties, or the situs of consideration promised or is the place where promised transactions are to occur, or where some burdensome consequence may be incurred, can have interests as real as those of situs state. In addition, there is at least some room for a deliberate preference for what is the better rule of law. Therefore, there can be cases in which the policy considerations of advancement of the forum's governmental interests and application of the better rule of law will outweigh the policy of predictability and uniformity of result which supports the situs rule on land. Leflar, *American Conflicts Law* 409-411 (1968).

Professor Weintraub also vigorously attacks the widely recognized situs rule. He says that the situs has an interest in applying its own law only when choice of law affects the use of the land. In other situations, especially where no third-party interest involved, and there is a dispute between original parties, the situs rarely has a dominant interest. So he suggests a functional approach similar to that in choice of law problems involving torts and contracts. Weintraub, *supra* note 28, at 338. See also, von Mehren and Trautman, *supra* note 10, at 193-200.

44) Reese, *supra* note 6, at 328. He admits that the state of injury may have a legitimate interest in having its own rule applied in such situations. However, he says that this interest is unlikely to exceed in intensity that of the state of common domicile. *Id.* But see *Conklin v. Horner*, 38 Wis. 2d 468, 157 N. W. 2d 579 (1968); *Milkovich v. Saari*, 295 Minn. 155, 203 N. W. 2d 408 (1973). In these cases, some courts have applied the law of the place of injury. See also Trautman, *Two Views on Kell v. Henderson*, 67 Colum. L. Rev. 465 (1967).

45) Professor Trautman doubts whether Judge Fuld's first rule (see *supra* note 41) will be followed in a case in which the parties' domicile and the place of registration of the car is a state with a guest statute, and the state of the place of accident casts the driver in liability. He says: "It is quite conceivable that a proper examination of the competing policies would lead to imposing liability under the law of the place of accident. A strong policy of compensating all victims of automobile accidents, including guests, in recognition of the increasing destructiveness of the automobile and the serious injuries often inflicted, might well be found to warrant application in the face of weak or non-existent policy bases for the guest statutes involved." Trautman, *supra* note 11, at 378-79. See also, Hancock, "Some Choice-of-Law Problems Posed by Anti-Guest Statutes: Realism in Wisconsin and Rule Fetishism in New York," 27 Stan L. Rev. 775, 788 (1975); Leflar, *supra* note 43, at 409-11; Weintraub, *supra* note 28, at 338.

46) Reese, *supra* note 6, at 328.

will almost certainly have the greatest concern in the application of its tort rule relating to standards of conduct, provided that the act did not measure up to the pertinent standard.<sup>47)</sup> And capacity is another issue where it may be possible to state a precise rule to the effect that a person will be held to have capacity to contract if he has such capacity under the law of the state of his domicil. Professor Reese also suggests a rule that a person who acts and causes injury in the state of injury in the state of his domicil should not be subjected to a higher measure of responsibility in tort than would be imposed by the law of that state.<sup>48)</sup> These rules seem to me less objectionable in the sense that they take into account the local and multistate policies in the particular issue. However, it seems to me that these situations may be found to be false conflicts in terms of functional or interest analysis. In this sense, the process of formulating narrow and precise rules of this kind is somewhat similar to that of finding false conflicts. In any event, according to Professor Reese, it is doubtful that we are now in a position to form good choice of law rules in all choice of law field especially in either tort or contract. Both fields are vast and many of their segments remain relatively unexplored. Pending the development of rules, the courts should look in each case to the basic policies involved § 6 and strive to reach the result that would best implement these policies.<sup>49)</sup>

### III Intermediate Stage

There is an intermediate stage between the time when decisions are derived directly from the underlying policies and the time when precise rules are formulated. According to Professor Reese, it may be that at the present time most areas of choice of law can be usefully covered by principles of this sort.<sup>50)</sup> I will examine some examples of this sort of rules in the Restatement Second. The provisions of § 146, and § 147 state that issues arising from tortious injuries to persons or to tangible property are determined by

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47) *Id.*, at 328-29.

48) *Id.*, at 330-32.

49) *Id.*, at 321-22.

50) *Id.*, at 324.

the law of the state where the injury occurred unless some other state happens to be that of the most significant relationship under the principle of § 6. And with respect to multistate invasion of privacy, the local law of the state where the plaintiff was domiciled will usually be applied (§ 153). In the contract area, in the absence of effective choice of law by the parties, the validity of a contract for the transfer of an interest in land and the rights created thereby are determined by the local law of the state where the land is situated, and the validity of a contract for the repayment of money lent and the right created thereby are determined by the local law of the state where the contract requires that repayment be made, unless some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties (§ 189, § 195).

These provisions indicate that the law of a particular state will usually be applied with respect to a particular issue or a particular kind of tort or contract. In this sense, they provide some certainty and predictability as well as some guidance for the courts.<sup>51)</sup> It may no longer always be necessary for courts and lawyers to look to the underlying policies in arriving at a decision.<sup>52)</sup> On the other hand, these provisions presuppose that some other state will be the state of applicable law in certain exceptional situations. Whether such an exceptional situation exists should be determined in the light of the factors set forth in § 6.<sup>53)</sup> These provisions may be similar to Professor Cavers's principles of preference, as far as they are the principles at intermediate stage between precise rules and approach. The essential difference between the Restatement Second principles and Cavers's principles of preference are that the former is in part jurisdiction-selecting and on the other hand the latter are entirely dependant upon the content of the relevant laws of the potentially interested states.<sup>54)</sup>

Next, some examples of rules which are a little more definite will be

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51) Id, at 323. However, Professor Leflar doubts whether these provisions of the Restatement Second are much help. He says that they seem to give a delusive appearance of certainty, which, in the torts choice of law area, is neither real nor desirable, Leflar, *supra* note 12, at 273-74.

52) Reese, *supra* note 6, at 324.

53) Id, at 325.

examined. For example, § 283 provides:

§ 283 Validity of Marriage

- (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
- (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

Comment b states that the protection of the justified expectations of the parties is of considerable importance in the case of marriage. And the need for protecting the expectations of the parties gives importance in turn to the values of certainty, predictability and uniformity of result. Protection of the justified expectations of the parties is also a basic policy underlying the field of marriage. Another factor which is of great importance in the area of choice of law with respect to marriage is implementation of the relevant policies of the state with the dominant interest in the determination of the particular issue. From these policy considerations, the following rule can be stated. (1) A marriage which meets the requirements of the state of celebration will usually be held valid everywhere. This result is supported primarily by the policy consideration of the protection of the justified expectation

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54) Professor Reese says that he agrees with Professor Cavers's opinion in the following basic points: (1) We should avoid *ad hoc* decision and achieve whatever certainty and predictability is possible in choice of law; (2) difficult choice of law questions are unlikely to be resolved by the process of construing and interpreting the relevant laws of each potentially interested states; (3) in the quest for certainty and predictability, the court should start with flexible general principles rather than precise rules. However, he prefers the principles of the Restatement Second to the principles of preference of Professor Cavers. He says that the principles of the Restatement Second have at least three advantages: (1) they are more in keeping with existing case law; (2) they are easier to apply; (3) they are less likely to require the court to engage in what may be tremendously difficult and uncertain task of determining which of two or more purposes of a law is the primary purpose. Reese, Book Review, Fordam L. Rev. 153, 156-59 (1966).

of the parties. (2) However, marriage is not only a private matter but also a matter of intense public concern. We can not ignore the relevant policies of the state with the dominant interest in the marriage. Therefore, a marriage will not be held valid when it is against a strong public policy of a state which has the most significant relationship to the marriage, to uphold the validity of the marriage which is valid under the local law of the place of celebration. For example, when the state where at least one of the spouses was domiciled at the time of marriage and both made their home immediately thereafter, prohibits polygamous marriage, certain incestuous marriages or marriages of minors, the marriage which violates these prohibitions may be held invalid.<sup>55)</sup> In this situation, we can say that, when two policy considerations point in different direction or clash, the factor of implementation of the relevant policies of the state with the dominant interest in the determination of the particular issue is given greater importance. (3) Finally, even if a marriage is not valid with respect to the requirement other than formalities, the marriage should not be held invalid, provided that it would be valid under the local law of some other state having a substantial relationship to the parties (for example the state of domicile of the parties).<sup>56)</sup> In this situation, upholding the validity of the marriage by application of the validity rule of the state of domicile will be required by both of the choice of law policies mentioned above.

A similar provision can be found in § 287 which deals with legitimacy.<sup>57)</sup> In these family law areas we can formulate to some extent definite rules, because we can decide to some extent definitely, what are the basic policies

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55) Restatement, Second, Conflict of Laws 283, Comment h-i (1971). With respect to marriage provisions of the Restatement Second, see Baade, "Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second), 72 Colum. L. Rev. 329, 354-381 (1972).

56) Restatement, Second, Conflict of Laws § 283, Comment i (1971).

57) § 287 Law Governing Legitimacy;

(1) Whether a child is legitimate is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the child and the parent under the principles stated in § 6.

(2) The child will usually be held legitimate if this would be his status under the local law of the state where either (a) the parent was domiciled when the child's status of legitimacy is claimed to have been created or (b) the child was domiciled when the parent acknowledged the child as his own.



in determining the governing law, and when they point in different directions, which policy we should give priority. However, as far as these provisions call for the application of the law of the state of most significant relationship, they are not perfectly definite rules. It seems to the present writer that is the reason why the chapter on status was eliminated from the field where definite rules can be found in the Proposed Official Draft in 1967. As mentioned earlier, according to Professor Reese, we have probably reached the stage where most areas of choice of law can be covered by general principles which are subject to imprecise exceptions — the intermediate stage. He insists that we should press on, however, beyond these principles to the formulation of precise rules.<sup>58)</sup> He also suggests that the formulation of precise rules has already begun even in the tort field, which has been most uncertain.<sup>59)</sup> In this sense it can be said that Professor Reese is now in the position more favorable to rules than before, when he was the Reporter of the Restatement Second. It is necessary to watch further developments in American Conflict of Laws in order to find whether this prediction comes true.

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58) Reese, *supra* note 6, at 334.

59) *Id.*, at 333.