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Conflict of Laws

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Following a brief discussion with the Chair, three possible scopes for a hypothetical provision on conflict of laws are briefly explored in this note for consideration and comment by the Committee.

Scope 1) Negotiability only

We take negotiability of instruments as the legal possibility for an unconditional promise or order to pay a fixed amount of money (UCC § 3-104, a) to be payable (i.e. transfer of title as to the promised amount) to the transferee/beneficiary

- A) The minimalistic option that the Committee might consider: “the inclusion of a choice of law or choice of forum clause will not affect negotiability of the instrument”
- B) Could a conflict of laws rule read: “the inclusion of a choice of law clause will not affect negotiability of the instrument” ?
 - b) Technically yes, the rule of conflict of laws may read: “when a negotiable instrument involves a choice between the laws of different States the parties may agree that the law of a state shall govern. Should such law deny the negotiability of the instrument the law of the forum governs negotiability.”
 - c) Not really in substance: the governing law, whether chosen by the parties or determined by a court under the forum’s rule of conflict of laws, governs in principle all aspects of the negotiable instrument, including its negotiability which is key. It would be difficult, if not impossible, to split the same instrument between the law of the forum (confirming negotiability) and the others aspects governed by a law which denies negotiability to the same instrument.
- C) Conflict of Jurisdictions: could a new rule in the UCC read “the inclusion of a choice of forum clause will not affect negotiability of the instrument” ?
 - a. If the chosen court is in a UCC jurisdiction then the rule of conflict of laws considered above (B), if adopted (unlikely) in the UCC, could help (negotiability is a matter of substantive law / conflict of laws and governing law, not jurisdiction).
 - b. If the chosen court is outside the USA, not in a UCC jurisdiction, that jurisdiction’s rule of conflict of laws would determine the governing law from its own perspective, regardless of the conflict of laws rule considered above (B) if (unlikely) it were adopted in the UCC.

Scope n.2: Conflict of laws as to other aspects of the negotiable instruments ? (beyond negotiability)

First of all, what other aspects should this Committee's work cover and govern in terms of a rule of conflict of laws ?

D) While scope ("aspects X/Y") is discussed I suggest for consideration the following skeleton for such a rule:

- 1) This article determines the law governing the aspects X / Y of the negotiable instruments that involve a choice between the laws of different States:
 - a) whether or not that law is that of a UCC jurisdiction in the USA, or a foreign jurisdiction;
 - b) only as to the substantive rules of the governing law other than its choice of law rules (exclusion of renvoi);
- 2) The governing law is
 - a) chosen by the parties expressly or by a choice demonstrated by the terms of the contract or the circumstances of the case;
 - b) determined, if the governing law has not been chosen in accordance with (a), as follows:
 - i. suitable connecting factors to be identified depending on scope: the type of negotiable instruments concerned and, within the relevant type, the aspects X/Y (to be discussed/defined). Identifying such suitable factors would be an important part of the work.
- 3) The governing law determined under par. 2 of this article
 - a) is applied unless the effects of its application would be manifestly contrary to the public policy of the forum;
 - b) does not prevent the application of those provisions of the law of the forum which, irrespective of rules of conflict of laws, must be applied even to international situations (internationally mandatory rules).

In order to facilitate a discussion, I retained rather neutral and international terminology in 1) and 3), close to The Hague Conference Convention which is in force in the USA since 2017.¹

Pursuing on working on this skeleton, as soon as scope ("aspects X/Y") is agreed upon, should be the priority in my view, instead of focusing on the "minimalistic" scope n.1 ("Negotiability" only) (see above).

A rule on conflict of laws (possibly also choice of court / conflict of jurisdictions) as suitable and as fit as possible to each "aspects X/Y" (type of negotiable instruments concerned as a whole, or in part) should be elaborated and adopted to increase legal predictability.

¹ CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY (Concluded 5 July 2006).

Scope n.3 Conflict of laws as to other issues outside and beyond negotiable instruments ?

Not at present, it seems. However, should such scope be agreed upon within the Committee a suitable provision on conflict of laws (possibly also choice of court / conflict of jurisdictions) should be elaborated and adopted to increase legal predictability, instead of relying merely on art. § 1-301, UCC, on conflict of laws, whose scope is much broader than scope 1 (negotiability) and 2 (some aspects of the negotiable instruments) and whose content is consequently much less specific.

It reads as follows:

§ 1-301. Territorial Applicability; Parties' Power to Choose Applicable Law.

- a) Except as otherwise provided 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.
- (b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state.
- (c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:
 - (1) Section 2-402;
 - (2) Sections 2A-105 and 2A-106;
 - (3) Section 4-102;
 - (4) Section 4A-507;
 - (5) Section 5-116;
 - [(6) Section 6-103;
 - (7) Section 8-110;
 - (8) Sections 9-301 through 9-307.