

Now or Then? The Temporal Aspects of Choice-of-Law Clauses

Several years ago, I published a paper that examined how U.S. courts interpret choice-of-law clauses. That paper contains a detailed discussion of the most common interpretive issues—whether the clause selects the tort laws of the chosen jurisdiction in addition to its contract laws, for example—that arise in litigation. There was, however, one important omission. The paper did not consider the question of whether the word “laws” in a choice-of-law clause should be interpreted to select the laws of the chosen jurisdiction (1) at the time the contract was signed, or (2) at the time of litigation.

In declining to address this issue, the paper was in good company. Neither the *Restatement (Second) of Conflict of Laws* (§ 2) nor the draft *Restatement (Third) of Conflict of Laws* (§ 1.02) discuss the relationship between choice-of-law and time. Nevertheless, the omission bothered me.

In the spring of 2021, I saw that Jeff Rensberger at the South Texas College of Law had posted a paper to SSRN entitled *Choice of Law and Time*. After downloading and reading the paper, I discovered that it contained no discussion of choice-of-law clauses. It was devoted solely to the question of how courts should address the issue of temporality in cases where the parties had declined to select a law in advance. After reading the paper, I wrote to Jeff to propose that we collaborate on a second paper that specifically addressed the temporal question in the context of choice-of-law clauses. When we spoke on the phone to discuss the project, however, we did not agree on the answer. Jeff argued for the laws at the time of signing. I argued for the laws at the time of litigation.

In early 2022, Jeff sent me a draft of his new paper, *Choice of Law and Time Part II: Choice of Law Clauses and Changing Law*, which makes the case for interpreting choice-of-law clauses to select the law at the time of signing. In response, I drafted an essay arguing that they should be interpreted to select the law at the time of litigation. A draft of my essay, *The Canon of Evolving Law*, is now available for download on SSRN.

If you happen to be one of the small number of people in the world interested in

this fascinating (though obscure) interpretive issue, I would encourage you to download both papers and decide for yourself who has the better of the argument.

[This post is cross-posted at Transnational Litigation Blog.]