

“Without Regard to Principles of Conflict of Laws”

It is common to see some variation of the phrase “without regard to conflict of laws principles” appear at the end of a choice-of-law clause. Here are some examples:

“This Agreement shall be governed by and construed in accordance with the laws of the Republic of China, *without regard to its principles concerning conflicts of laws.*”

“This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of Delaware, *without giving effect to principles of conflicts of law.*”

“This Note is being delivered in and shall be construed in accordance with the laws of the State of New York, *without regard to the conflict of laws provisions thereof.*”

Although this phrase is common, its purpose and origin are poorly understood. In 2020, I published an article, *A Short History of the Choice of Law Clause*, that attempted to demystify these issues.

The original purpose of this language, as best I can tell, was to signal disapproval of decisions such as *Duskin v. Pennsylvania-Central Airlines Corporation*, a 1948 case in which a U.S. court interpreted a clause choosing Pennsylvania law to select the whole law of Pennsylvania (including its conflicts rules). The court then applied Pennsylvania conflicts rules to conclude that the agreement was, in fact, governed by the law of Alabama. Needless to say, it seems highly unlikely that this is what the parties intended.

When the *Restatement (Second) of Conflict of Laws* was published, it criticized the holding in *Duskin*. The drafters of the *Restatement* took the position that choice-of-law clauses should not be interpreted to select the conflicts rules of the chosen jurisdiction. The prominence assigned to the topic in the section of the

new *Restatement* dealing with choice-of-law clauses (Section 187(3)) prompted contract drafters across the United States to think seriously about the issue for the first time. So far as I can determine, the language quoted above did not appear in a single U.S. choice-of-law clause drafted before the late 1960s. In the years that followed the publication of the *Restatement (Second)* in 1971, the number of contracts containing this language exploded.

The irony is that the holding in *Duskin* was widely ignored by U.S. courts. In the decades since that case was decided, these courts have consistently interpreted choice-of-law clauses to exclude the conflicts rules of the chosen jurisdiction even when they omit the phrase “without regard to principles of conflict of laws.” Nevertheless, this language continues to be written into thousands upon thousands of choice-of-law clauses each year.