

# **TEXAS CHOICE OF LAW RULES**

**ROGER A. BARTLETT**  
**2301 S. Capital of Texas Highway, Suite H102**  
**Austin, Texas 78746**  
**roger@rablaw.com**

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**CHAPTER 3**

## ROGER A. BARTLETT

2301 S. Capital of Texas Highway, Suite H102  
Austin, Texas 78746  
(512) 236-9363 (phone)  
(512) 476-9991 (fax)  
roger@rablaw.com

### Education

- Juris Doctor, University of Texas at Austin, May 1974

### Professional Activities

- American Bar Association
- Austin Bar Association (Past Chairman, Financial Institutions Section)
- College of the State Bar of Texas
- State Bar of Texas
- Texas Association of Bank Counsel (Director, 1998-2001)
- Texas Bar Foundation (Sustaining Life Fellow)
- Texas Center for Legal Ethics and Professionalism
- Member, Commercial Code Committee of the Business Law Section of the State Bar of Texas, 1995-present (Chairman, Commercial Code Committee, 2002-2006) (Chairman, Article 9 Subcommittee, 2001-2006)
- Council Member, Business Law Section of the State Bar of Texas, 2005-present
- Vice-Chair, Business Law Section of the State Bar of Texas, 2007-2008

### Publications, Institute Papers, Programs, Etc.

- Editor, *Texas Collections Manual, Second Edition* (State Bar of Texas, 1987, 2 vols.) and subsequent supplements
- Coauthor, with Roy Ryden Anderson (Professor of Law, Dedman School of Law, SMU, Dallas, Texas) and W. David East (Professor of Law, South Texas College of Law, Houston, Texas), *Anderson, Bartlett & East's Texas Uniform Commercial Code Annotated* (Thomson West 2007) (published annually since 2002)
- Course Director, Second Annual Advanced Creditors' Rights Course (State Bar of Texas, 1987)
- Author and speaker, "Remedies Under Article 9 of the Uniform Commercial Code," Third Annual Advanced Creditors' Rights Course (State Bar of Texas, 1988)
- Author and speaker, "Self-Help Repossession," Fifth Annual Advanced Creditors' Rights Course (State Bar of Texas, 1990)
- Panelist, "Business Law," Legislative Update satellite broadcast/webcast (State Bar of Texas, 2003)
- Author and speaker, "Texas Choice of Law, Including Recent Legislative Changes," Advanced Business Law Course (State Bar of Texas, 2003)
- Author and panelist, "Business Law," Legislative Update satellite broadcast/webcast (State Bar of Texas, 2005)
- Author, "2005 Amendments to Texas Uniform Commercial Code," 41 *Texas Journal of Business Law* 231 (2006)
- Planning committee chair, Advanced Business Law Course (State Bar of Texas, 2008)

## TEXAS CHOICE OF LAW

## I. INTRODUCTION

This material will cover Texas choice of law rules as applied to contracts. It will not address rules in tort or, except for the Uniform Commercial Code, deviations from the general rule.

## II. GENERAL RULE

## A. No Choice by Parties—“Most Significant Relationship” Rule

If the parties have not agreed which law will apply to their transaction, Texas law will provide the law of the jurisdiction that has the “most significant relationship” to the transaction, which may not be the same result as if the rule of *lex loci contractus* (the law of the place where the contract was made) is applied. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420-21 (Tex. 1984).

The “most significant relationship” rule adopted by the supreme court in *Duncan* is that found in RESTATEMENT (SECOND) OF CONFLICT OF LAWS (“Restatement”) §§ 6 and 145, which provide:

## § 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive 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,

(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.

## § 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined

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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 domicile, 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.

## B. Choice by Parties—“Limited Party Autonomy Rule”

In Texas the parties to most contracts may select the jurisdiction whose law will govern their contract. Texas courts apply the “party autonomy” rule of Restatement § 187, which provides:

## § 187. Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or

(b) *application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties [emphasis added].*

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

### 1. Analysis of Enforceability of Parties' Choice—*DeSantis v. Wackenhut Corp.*

In *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990), the Texas Supreme Court applied § 187 to a contract, stating that the party autonomy rule is “best formulated” by § 187. *DeSantis*, an individual, had contracted with Wackenhut Corp. to manage Wackenhut’s Houston office. Wackenhut was chartered and headquartered in Florida and signed the contract there, and *DeSantis* signed it in Texas. The contract included the parties’ agreement “that any questions concerning interpretation or enforcement of this contract shall be governed by Florida law.” *Id.* at 675.

At trial Wackenhut pointed to the parties’ express agreement that Florida law would apply and *DeSantis* urged application of Texas law.

Perhaps because the supreme court had not previously ruled on what effect should be given to choice of law expressed by parties in a contract, it included in its opinion some background on choice of law jurisprudence, stating that it was mindful of “the most basic policy of contract law, which is the protection of the justified expectations of the parties.” *Id.* at 677. It continued:

The parties’ understanding of their respective contractual rights and obligations depends in part upon the certainty with which they may predict how the law will interpret and enforce their agreement. . . . When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction’s law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of laws concept has come to be referred to as party autonomy. . . . However, the parties’ freedom to choose what jurisdiction’s law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend

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the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law. With roots deep in two centuries of American jurisprudence, limited party autonomy has grown to be the modern rule in contracts conflict of laws [*Id.* at 677].

It also quoted from *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W. 2d 806, 808-809 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref’d n.r.e.) (emphasis added):

[A]n express agreement of the parties that the contract is to be governed by the laws of a particular state will be given effect if the contract bears a reasonable relation to the chosen state and *no countervailing public policy of the forum demands otherwise.*

In *DeSantis* the supreme court looked at § 187(1) of the Restatement and concluded that it did not apply because “[t]he issue before us—whether the noncompetition agreement in this case is enforceable—is not ‘one which the parties could have resolved by an explicit provision in their agreement.’” Consequently the issue would be resolved by application of § 187(2). 793 S.W.2d at 678.

The supreme court found a three-prong test in § 187(2)(b):

- “whether Texas has a more significant relationship to these parties and their transaction than [does] Florida”
- “whether Texas has a materially greater interest than [does] Florida in deciding the enforceability of the noncompetition agreement in this case” and
- “whether the application of Florida law in this case would be contrary to fundamental policy of Texas.” *Id.*

The supreme court concluded on the first point that “the gist of the agreement in this case was the performance of personal services in Texas [and] [a]s a rule, that factor alone is conclusive in determining what state’s law is to apply,” citing Restatement § 196 on contracts for the rendition of services, which provides:

#### § 196. Contracts for the Rendition of Services

The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to

the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

The supreme court concluded on the second point that “the relationship of the transaction and parties to Texas was clearly more significant than their relationship to Florida” and “Texas has a materially greater interest than does Florida in determining whether the noncompetition agreement in this case is enforceable” because:

At stake here is whether a Texas resident can leave one Texas job to start a competing Texas business. Thus, Texas is directly interested in DeSantis as an employee in this state, in Wackenhut as a national employer doing business in this state, as RDI [DeSantis’s new business] as a new competitive business being formed in the state, and in consumers of the services furnished in Texas by Wackenhut and RDI and performed by DeSantis. Texas also shares with Florida a general interest in protecting the justifiable expectations of entities doing business in several states. Florida’s direct interest in the enforcement of the noncompetition agreement in this case is limited to protecting a national business headquartered in that state.” 793 S.W.2d at 679.

The third prong, whether application of Florida law would be contrary to fundamental policy of Texas, took considerably more discussion. The focus, the supreme court said, is on “whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties’ original intentions, and even though the agreement would be enforceable in another state connected with the transaction”; it is not merely whether application of Florida law would lead to a different result than application of Texas law, and it is not merely a question of whether Florida law is materially different from Texas law. *Id.* at 680. The court said that a noncompetition agreement is a restraint of trade and thus will not be enforced unless it is reasonable, because “unreasonable restraints of trade, including unreasonable covenants not to compete, contravene public policy.” *Id.* The court concluded that this noncompetition agreement was unreasonable in scope and its enforceability would be judged by application of Texas law, not Florida law as chosen by the parties. *Id.* at 681.

### III. EXCEPTIONS TO GENERAL RULE

*DeSantis* (see II.B.1. above) is the best statement of Texas courts’ view of applicable choice of law rules when no particular statute provides guidance. There are several rules in the Texas Business and Commerce Code, most in the Uniform Commercial Code provisions therein, that speak to choice of law.

#### A. General Rule for Uniform Commercial Code

Chapter 1 of the Business and Commerce Code has for some time contained a choice of law provision that applies to chapters 1-9 (the Uniform Commercial Code articles) absent other provisions. As discussed at the end of III.A. below, these rules remain the law in Texas despite a revision of choice of law rules in Article 1 of the UCC that is now proposed for adoption around the country.

The general choice of law rule under the Texas UCC is:

#### § 1.301. TERRITORIAL APPLICATION OF THE TITLE; PARTIES’ POWER TO CHOOSE APPLICABLE LAW

(a) 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.

(b) 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. Section 2.402.

Applicability of the chapter on Leases. Sections 2A.105 and 2A.106.

Applicability of the chapter on Bank Deposits and Collections. Section 4.102.

Governing law in the chapter on Funds Transfers. Section 4A.507.

Letters of Credit. Section 5.116.

Applicability of the chapter on Investment Securities. Section 8.110.

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. Sections 9.301-9.307.

(c) If a transaction that is subject to this title is a “qualified transaction,” as defined in Section 35.51 of this code, then except as provided in Subsection (b) of this section, Section 35.51 governs the effect of an agreement by the parties that the law of a particular jurisdiction governs an issue relating to the transaction or that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement. [TEX. BUS. & COMM. CODE § 1.301]

For the complete text of the sections to which § 1.301(b) refers, see Appendix A to these materials.

Revised Article 1 of the Uniform Commercial Code, as recently approved by the American Law Institute (“ALI”) and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), revised the choice of law provisions from the foregoing, which had been in § 1.105 of the former version, to eliminate the “reasonable relationship” requirement except with respect to consumer transactions and would have added additional restrictions with respect to consumer transactions. Apparently because it was thought that the revised uniform provision adopted by ALI and NCCUSL would have been an unjustified, significant departure from existing Texas law, the uniform version of § 1.301 was not adopted and the former uniform version (which had been in § 1.105) was retained and moved to § 1.301. 78th Legislature, Reg. Sess., H.B. 1394.

## B. Qualified Transactions (\$1,000,000 or more)

In 1993 the Texas Legislature enacted a provision that removed the fundamental-policy prong from the analysis of certain transactions of \$1,000,000 or more so long as “the transaction bears a reasonable relation” to the state chosen. TEX. BUS. & COMM. CODE § 35.51. (See the discussion of the three-prong test in II.B.1. above.)

This exception applies to all “qualified transactions,” which are transactions under which aggregate consideration is at least \$1,000,000 and loan transactions of at least \$1,000,000 (*id.* § 35.51(a)(2)); a “transaction” “includes more than one substantially similar or related transaction entered into contemporaneously and having at least one common party” (*id.* § 35.51(a)(1)).

There are five tests to whether a transaction bears a reasonable relation to a chosen jurisdiction, any one of which is sufficient:

- a party to the transaction resides in that jurisdiction; or
- a party to the transaction has its place of business in the jurisdiction; or, if it has more than one place of business, it has its chief executive office (or an office from which it conducts a substantial part of the negotiations relating to the transaction) in the jurisdiction; or
- all or part of the subject matter of the transaction is located in the chosen state; or
- a party to the transaction is required to perform a substantial part of its obligations relating to the transaction (which may include delivering payments) in that jurisdiction; or
- a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in the jurisdiction. *Id.* § 35.51(d).

Some issues relating to real property are exempted from the § 35.51 exception. *Id.* § 35.51(f).

For the complete text of §§ 35.51 and 35.52, see Appendix A to these materials.

## C. Sales of Goods

The law of the jurisdiction where the goods are located governs the determination of whether the seller’s retention of possession is fraudulent and thus allows the seller’s creditor to treat the sale (or identification of goods to a contract for sale) as void. TEX. BUS. & COMM. CODE § 2.402(b).

For the complete text of § 2.402, see Appendix A to these materials.

## D. Leases of Personal Property

In the case of leased goods covered by a certificate of title, compliance (and the effect of compliance or noncompliance) with the certificate of title statute is governed by the law of the jurisdiction issuing the certificate. TEX. BUS. & COMM. CODE § 2A.105. This rule ceases to apply on the earlier of surrender of the certificate or four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction. *Id.*

In the case of a consumer lease, the parties’ choice of law is not enforceable if they chose the law of a jurisdiction other than that in which the lessee resides when the lease becomes enforceable or within thirty days thereafter. *Id.* § 2A.106.

For the complete text of §§ 2A.105 and 2A.106, see Appendix A to these materials.

### E. Bank Deposits and Collections

The law of the bank's location governs liability of a bank for action or inaction with respect to an item handled by the bank for purposes of presentment, payment, or collection. TEX. BUS. & COMM. CODE § 4.102(b). If the action or inaction was by or at a branch or separate office of the bank, liability is governed by the law of the jurisdiction where the branch or separate office is located. *Id.*

In the case of a deposit contract between the bank and a consumer account holder, the law of Texas governs the deposit contract if the branch or separate office of the bank that accepts the deposit contract is located in Texas. *Id.* § 4.102(c).

For purposes of chapters 3 and 4 of the Business and Commerce Code, credit unions are considered banks. American Airlines Employees Federal Credit Union v. Martin, 29 S.W.3d 86 (Tex. 2000).

For the complete text of § 4.102, see Appendix A to these materials.

As to security interests in deposit accounts, see III.I.4. below.

### F. Funds Transfers

The parties' choice of law will govern rights and obligations between each other with regard to a funds transfer, whether or not the payment order of the funds transfer bears a reasonable relation to the chosen jurisdiction. Tex. Bus. & Comm. Code § 4A.507(b). To the extent permitted by § 1.301 (see III.A. above), their choice will also govern validity of the agreement. *Id.*

If there is no agreement between the parties as to choice of law:

- the rights and obligations between the sender and the receiving bank are governed by the law of the jurisdiction where the receiving bank is located;
- the rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction where the beneficiary's bank is located; and
- the issue of when payment is made by the originator to the beneficiary is governed by the law of the jurisdiction where the beneficiary's bank is located. *Id.* § 4A.507(a).

A funds transfer system may select the law of a particular jurisdiction, and the choice will be binding on participating banks, to govern:

- rights and obligations between participating banks with respect to payment orders transmitted or processed through the system; or
- the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. *Id.* § 4A.507(c).

A choice of law made pursuant to the second bullet point above is also binding on the originator, other sender, or a receiving bank having notice that the funds transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. *Id.*

As to matters of construction an interpretation, the law chosen under § 4A.507(c) may govern even if the law does not bear a reasonable relation to the matter in issue. *Id.*

If there is inconsistency between an agreement under § 4A.507(b) and a choice of law rule under § 4A.507(c), the agreement under (b) prevails. *Id.* § 4A.507(d).

If more than one funds transfer system is used in a funds transfer and there is inconsistency between the systems' choice of law rules, the matter in issue is governed by the law of the chosen jurisdiction that has the most significant relationship to the matter in issue. *Id.* § 4A.507(e).

For the complete text of § 4A.507, see Appendix A to these materials.

### G. Letters of Credit

The parties may choose the law that will govern the liability for the action or omission of an issuer, nominated person, or adviser, and the chosen law need not bear any relation to the transaction. TEX. BUS. & COMM. CODE § 5.116(a). If they failed to choose, the law of the jurisdiction in which the person is located will govern. *Id.* § 5.116(b).

The Uniform Customs and Practice for Documentary Credits (or other rules of custom or practice) will control if it is incorporated into the relevant undertaking by the parties except to the extent of any conflict with the nonvariable provisions specified in § 5.103(c). *Id.* § 5.116(c).

In the case of international shipments of goods by air, the Warsaw Convention probably governs. Banihashemrad v. Lufthansa Cargo AG, 28 F.Supp. 1014 (W.D. Tex. 1998).

For the complete text of § 5.116, see Appendix A to these materials.

## H. Investment Securities

The local law of the issuer's jurisdiction governs the validity of a security; the rights and duties of the issuer with respect to registration of transfer; the effectiveness of registration of transfer by the issuer; whether the issuer owes any duties to an adverse claimant to a security; and whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security. TEX. BUS. & COMM. CODE § 8.110(a). Rules for determining the issuer's jurisdiction are in *id.* § 8.110(d).

The local law of the securities intermediary's jurisdiction governs acquisition of a security entitlement from the securities intermediary; the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement; whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder. *Id.* § 8.110(b). Rules for determining a securities intermediary's jurisdiction are in *id.* § 8.110(e)-(f).

The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered. *Id.* § 8.110(c).

The law of the jurisdiction in which an issuer is incorporated governs the validity of a stock restriction. Joslin v. Shareholder Services Group, 948 F.Supp. 627 (S.D. Tex. 1996).

For the complete text of § 8.110, see Appendix A to these materials.

## I. Secured Transactions

The adoption of revised Article 9, effective July 1, 2001, shifted governing law in many instances from the jurisdiction where the collateral is located to the jurisdiction where the debtor is located. For rules on determining the location of the debtor, see TEX. BUS. & COMM. CODE § 9.307.

For the complete text of §§ 9.301-9.307, see Appendix A to these materials.

### 1. General Rules

The general rules for choice of law in secured transactions under revised Article 9 are:

- the local law of the jurisdiction where the debtor is located (or organized) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral (TEX. BUS. & COMM. CODE § 9.301(1));
- the local law of the jurisdiction where collateral is located governs the same issues as to a *possessory* security interest in that collateral (*id.* § 9.301(2));
- except as provided in § 9.301(4), the local law of the jurisdiction where negotiable documents, goods, instruments, money, or tangible chattel paper is located governs perfection of a security interest in the goods by filing a fixture filing, the perfection of a security interest in timber to be cut, and the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral (*id.* § 9.301(3)); and
- the local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral (*id.* § 9.301(4)).

Exceptions to these general rules are discussed in the following subsections.

### 2. Agricultural Liens

For farm products, the local law of the jurisdiction where the farm product is located governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products while the farm product is located in that jurisdiction. TEX. BUS. & COMM. CODE § 9.302.

### 3. Goods Covered by Certificate of Title

For goods covered by a certificate of title, the local law of the jurisdiction that issued the certificate of title governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the goods for so long as the goods are covered by the certificate of title (TEX. BUS. & COMM. CODE § 9.303(c)), even if there is no other relationship between that jurisdiction and the goods or the debtor (*id.* § 9.303(a)).

### 4. Deposit Accounts

The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit

account maintained with that bank. TEX. BUS. & COMM. CODE § 9.304(a).

Rules for determining a bank's jurisdiction are in *id.* § 9.304(b).

For the complete text of § 9.304, see Appendix A to these materials.

### 5. Investment Property

For a certificated security, the local law of the jurisdiction where the certificate is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby, so long as the certificate is in that jurisdiction. TEX. BUS. & COMM. CODE § 9.305(a)(1).

For an uncertificated security, the local law of the issuer's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the security. *Id.* § 9.305(a)(2). Rules for determining a issuer's jurisdiction are in *id.* § 8.110(d).

For a security entitlement or a securities account, the local law of the securities intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the security entitlement or securities account. *Id.* § 9.305(a)(3). Rules for determining a securities intermediary's jurisdiction are in *id.* § 8.110(e).

For a commodity contract or a commodity account, the local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the contract or account. *Id.* § 9.305(a)(4). Rules for determining a commodity intermediary's jurisdiction are in *id.* § 9.305(b). The local law of the jurisdiction in which the debtor is located governs automatic perfection of a security interest in a commodity contract or commodity account. *Id.* § 9.305(c)(3).

The local law of the jurisdiction in which the debtor is located governs perfection of a security interest in investment property by filing; automatic perfection of a security interest in investment property created by a broker or securities intermediary; and automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary. *Id.* § 9.305(c).

For the complete text of § 9.305, see Appendix A to these materials.

### 6. Letter of Credit Rights

The local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority

of a security interest in a letter of credit right in the jurisdiction of the issuer or nominated person is a state. TEX. BUS. & COMM. CODE § 9.306(a).

This section does not apply to a security interest that is perfected only under § 9.308(d) (which provides that perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral). § 9.306(c).

The jurisdiction of an issuer or nominated person is the jurisdiction whose law governs the liability of such person with respect to the letter-of-credit right as provided in § 5.116 (see III.G. above). *Id.* § 9.306(b).

For the complete text of § 9.306, see Appendix A to these materials.

### J. Construction Contracts

As to most contracts for construction or repair of improvements to real property located in Texas, the contractor may void an provision in the contract that "makes the contract or any conflict arising under it subject to the law of another state, to litigation in the courts of another state, or to arbitration in another state." TEX. BUS. & COMM. CODE § 35.52(a).

For the complete text of § 35.52, see Appendix A to these materials.

### K. Internet Contracts

Certain contracts made over the Internet will be governed by Texas law unless each party to the contract who is located in Texas is given notice that another's state's law will apply and agrees to the application of that state's law. TEX. BUS. & COMM. CODE § 35.531(c).

This provision applies only to contracts made solely over the Internet between a person located in Texas and a person located outside Texas who does not maintain an office or agent in Texas for doing business in Texas. *Id.* § 35.531(b).

This section does not apply to a contract to which § 35.51 (on qualified transactions of not less than \$1,000,000) applies (see III.B. above), and §§ 1.301 and 35.53 do not apply to contracts to which this section applies.

For the complete text of § 35.531, see Appendix A to these materials.

## IV. CONSPICUOUSNESS OF PROVISIONS

In certain contracts, any provision subjecting the contract to another state's laws or to litigation or arbitration in another state must be set out conspicuously. TEX. BUS. & COMM. CODE § 35.53(b).

This requirement is met by using print, type, or another form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may apply would notice it. *Id.*

This requirement applies only to contracts for the sale, lease, exchange, or other disposition for value of goods for the price, rental, or other consideration of \$50,000 or less. In addition, some element of the execution of the contract must have occurred in Texas and at least one party to the contract must be an individual resident of Texas or an association or corporation created under the laws of Texas or having its principal place of business in Texas. *Id.* § 35.53(a).

For the complete text of § 35.53, see Appendix A to these materials.

**APPENDIX A****SELECTED STATUTES****TEXAS BUSINESS AND COMMERCE CODE****CHAPTER 1. GENERAL PROVISIONS****§ 1.301. Territorial Application of the Title; Parties' Power to Choose Applicable Law**

(a) 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.

(b) 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. Section 2.402.

Applicability of the chapter on Leases. Sections 2A.105 and 2A.106.

Applicability of the chapter on Bank Deposits and Collections. Section 4.102.

Governing law in the chapter on Funds Transfers. Section 4A.507.

Letters of Credit. Section 5.116.

Applicability of the chapter on Investment Securities. Section 8.110.

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. Sections 9.301-9.307.

(c) If a transaction that is subject to this title is a "qualified transaction," as defined in Section 35.51 of this code, then except as provided in Subsection (b) of this section, Section 35.51 governs the effect of an agreement by the parties that the law of a particular jurisdiction governs an issue relating to the transaction or that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement.

**CHAPTER 2. SALES****§ 2.402. Rights of Seller's Creditors Against Sold Goods**

(a) Except as provided in Subsections (b) and (c), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this chapter (Sections 2.502 and 2.716).

(b) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are

situated, except that retention of possession in good faith and current course of trade by a merchant seller is commercially reasonable time after a sale or identification is not fraudulent.

(c) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller

(1) under the provisions of the chapter on Secured Transactions (Chapter 9); or

(2) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this chapter constitute the transaction a fraudulent transfer or voidable preference.

## CHAPTER 2A. LEASES

### § 2A.105. Territorial Application of Chapter to Goods Covered by Certificate of Title

Subject to the provisions of Sections 2A.304(c) and 2A.305(c), with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of:

(1) surrender of the certificate; or

(2) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

### § 2A.106. Limitation on Power of Parties to Consumer Lease to Choose Applicable Law and Judicial Forum

(a) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(b) If the judicial forum chosen by the parties to a consumer lease is a forum located in a jurisdiction other than the jurisdiction in which the lessee in fact signed the lease agreement, resides at the commencement of the action, or resided at the time the lease contract became enforceable or in which the goods are in fact used by the lessee, the choice is not enforceable.

## CHAPTER 4. BANK DEPOSITS AND COLLECTIONS

### § 4.102. Applicability

(a) To the extent that items within this chapter are also within Chapters 3 and 8, they are subject to those chapters. If there is conflict, this chapter governs Chapter 3, but Chapter 8 governs this chapter.

(b) The liability of a bank for action or non-action with respect to an item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

(c) Notwithstanding Section 1.301, the laws of this state govern a deposit contract between a bank and a consumer account holder if the branch or separate office of the bank that accepts the deposit contract is located in this state. For purposes of this subsection, “consumer account holder” means a natural person who holds a deposit account primarily for personal, family, or household purposes but does not include a natural person who holds an account for another in a professional capacity.

## CHAPTER 4A. FUNDS TRANSFERS

### § 4A.507. Choice of Law

(a) The following rules apply unless the affected parties otherwise agree or Subsection (c) applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary’s bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary’s bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary’s bank is located.

(b) If the parties described by each subdivision of Subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations as to matters of construction and interpretation, whether or not the payment order of the funds transfer bears a reasonable relation to that jurisdiction, and as to validity, to the extent permitted by Section 1.301 of this code.

(c) A funds transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this Subsection (c) may govern, as to matters of construction and interpretation, whether or not the law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under Subsection (b) and a choice-of-law rule under Subsection (c), the agreement under Subsection (b) prevails.

(e) If a funds transfer is made by use of more than one funds transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

## CHAPTER 5. LETTERS OF CREDIT

### § 5.116. Choice of Law and Forum

(a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 5.104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless Subsection (a) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities, and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this chapter would govern the liability of an issuer, nominated person, or adviser under Subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 5.103(c).

(d) If there is conflict between this chapter and Chapter 3, 4, 4A, or 9, this chapter governs.

(e) The forum for settling disputes arising out of an undertaking within this chapter may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with Subsection (a).

## CHAPTER 8. INVESTMENT SECURITIES

### § 8.110. Applicability; Choice of Law

(a) The local law of the issuer's jurisdiction, as specified in Subsection (d), governs:

- (1) the validity of a security;
- (2) the rights and duties of the issuer with respect to registration of transfer;
- (3) the effectiveness of registration of transfer by the issuer;
- (4) whether the issuer owes any duties to an adverse claimant to a security; and

(5) whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in Subsection (e), governs:

- (1) acquisition of a security entitlement from the securities intermediary;
- (2) the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;
- (3) whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and



(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in Subdivision (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) perfection of a security interest in the goods by filing a fixture filing;

(B) perfection of a security interest in timber to be cut; and

(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

### § 9.302. Law Governing Perfection and Priority of Agricultural Liens

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.

### § 9.303. Law Governing Perfection and Priority of Security Interests in Goods Covered by a Certificate of Title

(a) This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

### § 9.304. Law Governing Perfection and Priority of Security Interests in Deposit Accounts

(a) The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.

(b) The following rules determine a bank's jurisdiction for purposes of this subchapter:

(1) If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this subchapter, this chapter, or this title, that jurisdiction is the bank's jurisdiction.

(2) If Subdivision (1) does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(3) If neither Subdivision (1) nor Subdivision (2) applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(4) If none of the preceding subdivisions applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.

(5) If none of the preceding subdivisions applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located.

### § 9.305. Law Governing Perfection and Priority of Security Interests in Investment Property

(a) Except as otherwise provided in Subsection (c), the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in Section 8.110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in Section 8.110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) The following rules determine a commodity intermediary's jurisdiction for purposes of this subchapter:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this subchapter, this chapter, or this title, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If Subdivision (1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither Subdivision (1) nor Subdivision (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of the preceding subdivisions applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding subdivisions applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) The local law of the jurisdiction in which the debtor is located governs:

(1) perfection of a security interest in investment property by filing;

(2) automatic perfection of a security interest in investment property created by a broker or securities intermediary; and

(3) automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

### § 9.306. Law Governing Perfection and Priority of Security Interests in Letter-Of-Credit Rights

(a) Subject to Subsection (c), the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state.

(b) For purposes of this subchapter, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in Section 5.116.

(c) This section does not apply to a security interest that is perfected only under Section 9.308(d).

### § 9.307. Location of Debtor

(a) In this section, "place of business" means a place where a debtor conducts its affairs.

(b) Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(c) Subsection (b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If Subsection (b) does not apply, the debtor is located in the District of Columbia.

(d) A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified in Subsections (b) and (c).

(e) A registered organization that is organized under the law of a state is located in that state.

(f) Except as otherwise provided in Subsection (i), a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) in the state that the law of the United States designates, if the law designates a state of location;

(2) in the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location; or

(3) in the District of Columbia, if neither Subdivision (1) nor Subdivision (2) applies.

(g) A registered organization continues to be located in the jurisdiction specified by Subsection (e) notwithstanding:

- (1) the suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or
  - (2) the dissolution, winding up, or cancellation of the existence of the registered organization.
- (h) The United States is located in the District of Columbia.
- (i) A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank re licenses in only one state.
- (j) A foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.
- (k) This section applies only for purposes of this subchapter.

### CHAPTER 35. MISCELLANEOUS [COMMERCIAL PROVISIONS]

#### § 35.51. Rights of Parties to Choose Law Applicable to Certain Transactions

- (a) In this section:
- (1) "Transaction" includes more than one substantially similar or related transaction entered into contemporaneously and having at least one common party.
  - (2) "Qualified transaction" means a transaction under which a party:
    - (A) pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate value of at least \$1,000,000; or
    - (B) lends, advances, borrows, or receives, or is obligated to lend or advance or is entitled to borrower or receive, funds or credit with an aggregate value of at least \$1,000,000.
- (b) Except as provided by Subsection (e) or (f) of this section or Section 35.52 of this code, if the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs an issue relating to the transaction, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement, and the transaction bears a reasonable relation to that jurisdiction, the law, other than conflict of laws rules, of that jurisdiction governs the issue regardless of whether the application of that law is contrary to a fundamental or public policy of this state or of any other jurisdiction.
- (c) Except as provided by Subsection (f) of this section and Section 35.52 of this code, if the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement, the law, other than conflict of laws rules, of that jurisdiction governs that issue regardless of whether the transaction bears a reasonable relation to that jurisdiction.
- (d) For purposes of this section, a transaction bears a reasonable relation to a particular jurisdiction if the transaction, the subject matter of the transaction, or a party to the transaction is reasonably related to that jurisdiction. A transaction bears a reasonable relation to a particular jurisdiction if:
- (1) a party to the transaction is a resident of that jurisdiction;

(2) a party to the transaction has its place of business, or if that party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;

(3) all or part of the subject matter of the transaction is located in that jurisdiction;

(4) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments, in that jurisdiction; or

(5) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction.

(e) Except as provided by Subsection (f) of this section of Section 35.52 of this code, if:

(1) the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs the validity or enforceability of an agreement relating to the transaction or a provision of the agreement;

(2) the transaction bears a reasonable relation to that jurisdiction; and

(3) a term of the agreement or of that provision is invalid or unenforceable under the law, other than conflict of laws rules, of that jurisdiction but is valid or enforceable under the law, other than conflict of laws rules, of the jurisdiction that has the most significant relation to the transaction, the subject matter of the transaction, and the parties, then:

(A) the law, other than conflict of laws rules, of the jurisdiction that has the most significant relation to the transaction, the subject matter of the transaction, and the parties governs the validity or enforceability of that term; and

(B) the law, other than conflict of laws rules, of the jurisdiction that the parties agree would govern the validity or enforceability of that agreement or of that provision governs the validity or enforceability of the other terms of that agreement or provision.

(f) Subsections (b)-(e) of this section do not apply to the determination of the law that governs:

(1) whether a transaction transfers or creates an interest in real property for security purposes or otherwise, the nature of an interest in real property that is transferred or created by a transaction, the method for foreclosure of a lien on real property, the nature of an interest in real property that results from foreclosure, or the manner and effect of recording or failing to record evidence of a transaction that transfers or creates an interest in real property;

(2) the validity of a marriage or an adoption, whether a marriage has been terminated, or the effect of a marriage on property owned by a spouse at the time of the marriage or acquired by either spouse during the marriage;

(3) whether an instrument is a will, the rights of persons under a will, or the rights of persons in the absence of a will; or

(4) an issue that another statute of this state, or a statute of the United States, provides is governed by the law of a particular jurisdiction.

(g) Subsections (b)-(e) of this section apply to the determination of the law that governs an issue relating to a transaction involving real property other than those specified in Subsection (f)(1) of this section, including the validity or enforceability of an indebtedness incurred in consideration for the transfer of, or the payment of which is secured by a lien on, real property.

### § 35.52. Law Applicable to Construction Contracts

(a) If a contract is principally for the construction or repair of improvements to real property located in this state and the contract contains a provision that makes the contract or any conflict arising under it subject to the law of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party that is obligated by the contract to perform the construction or repair.

(b) A contract is principally for the construction or repair of improvements to real property located in this state if the contract obligates a party, as its principal obligation under the contract, to provide labor, or labor and materials, for the construction or repair of improvements to real property located in this state as a general contractor or subcontractor.

(c) A contract is not principally for the construction or repair of improvements to real property located in this state if:

(1) the contract is a partnership agreement or other agreement governing an entity or trust;

(2) the contract provides for a loan or other extension of credit and the party promising to construct or repair improvements does so as part of its agreements with the lender or other extender of credit; or

(3) the contract is for the management of real property or improvements and the obligation to construct or repair is part of that management.

(d) Subsections (b) and (c) of this section are not an exclusive list of situations in which a contract is or is not principally for the construction or repair of improvements to real property located in this state.

### **§ 35.53. Notice of Law; Dispute Resolution Forum Applicable to Contract**

(a) This section applies to a contract only if:

(1) the contract is for the sale, lease, exchange, or other disposition for value of goods for the price, rental, or other consideration of \$50,000 or less;

(2) any element of the execution of the contract occurred in this state and a party to the contract is:

(A) an individual resident of this state; or

(B) an association or corporation created under the laws of this state or having its principal place of business in this state; and

(3) Section 1.105 of this code does not apply. [The reference should be to § 1.301 in light of the revision of chapter 1 this year, which moved choice of law provisions from § 1.105 to 1.301 but which inadvertently did not change this reference.]

(b) If a contract to which this section applies contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, the provisions must be set out conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would notice. If the provisions is not set out as provided by this subsection, the provision is voidable by a party against whom it is sought to be enforced.

### **§ 35.531. Law Applicable to Contract Made Over Internet**

(a) In this section, “Internet” means the largest nonproprietary nonprofit cooperative public computer network, commonly known as the Internet.

(b) Subject to Subsection (e), this section applies only to a contract made solely over the Internet between a person located in this state and a person located outside this state who does not maintain an office or agent in this state for doing business in this state.

(c) A contract to which this section applies is governed by the law of this state unless each party to the contract who is located in this state:

(1) is given notice that the law of the state in which another party to the contract is located applies to the contract; and

(2) agrees to the application of that state’s law.

(d) A person asserting that the law of another state applies to a contract has the burden of proving that notice was given and agreement was obtained as provided by Subsection (c).

(e) Sections 1.105 and 35.53 do not apply to a contract to which this section applies. This section does not apply to a contract to which Section 35.51 applies. [The reference to § 1.105 should be to § 1.301 in light of the revision of chapter 1 this year, which moved choice of law provisions from § 1.105 to 1.301 but which inadvertently did not change this reference.]