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COMMENT

Choice of Law: Defining the Place of Performance for General Contract Disputes in Oklahoma

I. Introduction

Choice of law is one component of the broader doctrine of conflict of laws¹ and provides a framework for determining which jurisdiction's laws and public policy should govern a cause of action when the action has "significant connections" with more than one jurisdiction.² Dean Prosser likened the topic of choice of law to a "dismal swamp" because of the complexity of its subject matter and the "incomprehensible jargon" employed by the scholars who write on it.³ This comment attempts to wade through the mire and present the subject of Oklahoma's contractual choice-of-law rules in a comprehensible manner. Unfortunately, the topic cannot be discussed without some reference to the "jargon" that permeates the case law and commentary.

Oklahoma's choice-of-law jurisprudence is no clearing within the puzzling jungle that comprises the choice-of-law subject. In Oklahoma, different choice-of-law theories are applied to tort suits than are applied in contract actions.⁴ While the former embraces a more modern interest-analysis approach, the latter relies on an older, territorial-based standard.⁵ Oklahoma's contractual choice-of-law jurisprudence is grounded on a statutory directive from title 15, section 162 of the Oklahoma Statutes which provides: "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."⁶

The primary purpose of this comment is to develop a standard for determining which place of performance should govern a contract when the parties have not selected their own choice of law and the contract indicates multiple places of performance. Initially, this question seems as if it should have been resolved by several different courts many times over; however, such is not the case. Incidental to this thesis is an examination of Oklahoma's

1. Russell J. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS § 1.1 (5th ed. 2006). The larger doctrine of conflict of laws also examines in which jurisdiction a suit can be brought and the effect of a foreign judgment. *See id.*

2. *See* 16 AM. JUR. 2D *Conflict of Laws* § 1 (1998).

3. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

4. *Bernal v. Charter Cnty. Mut. Ins. Co.*, 2009 OK 28, ¶ 12, 209 P.3d 309, 315.

5. *See* Weintraub, *supra* note 1, § 3.1, at 52.

6. 15 OKLA. STAT. § 162 (2001).

choice-of-law rules accompanied by critical commentary that will hopefully assist both judges and practitioners in understanding what the rules are — and what they are not.

Part II of this comment surveys Oklahoma's choice-of-law cases in order to explain the current choice-of-law rules and identify questions left unanswered by Oklahoma courts. Part III conducts a brief analysis of how other jurisdictions with statutes identical to section 162 interpret the provision's language. Part IV resolves the thesis of this comment and presents an argument for why section 162 should be understood to contemplate multiple places of performance. Part IV then formulates this "per-obligation" approach whereby each obligation in a contract, and the matters relating to it, are governed by the law of the place where that obligation is to be performed. This comment concludes in Part V.

II. Oklahoma Case Law

As a general matter, there are two categories of choice-of-law theories. The first is the old, territorial approach in which the law of the place where some event occurred or will occur governs the dispute.⁷ For contract disputes, the most common application of these theories yields the rule that the nature, validity and interpretation of a contract are governed by the law of the place where the contract was made.⁸ This rule is called "*lex loci contractus*," which means "the place of the contract," and which can refer to either the place where the contract is executed or the place where the contract is performed.⁹ This dual-use of the term has led to some confusion;¹⁰ however, the phrase is easier to understand if it is thought of as the conclusion of an inquiry rather than as its initiation.

The second category is comprised of various theories that are often referred to as "issue" or "functional" analysis standards.¹¹ Application of these standards requires inquiry into the underlying policies of the conflicting laws to determine which jurisdiction has the greatest interest in its law governing the dispute at bar.¹² The "most significant relationship" test from the *Restatement (Second) of Conflict of Laws* (1971) is a member of this school.

7. See Weintraub, *supra* note 1, § 3.1, at 52.

8. See *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 17, 820 P.2d 787, 793; see also, e.g., *C.I.T. Corp. v. Guy*, 195 S.E. 659, 661 (Va. 1938).

9. BLACK'S LAW DICTIONARY 995 (9th ed. 2009); see also Kenneth R. Webster, Note, *Contractual Obligations, Conflicts of Law Symposium*, 18 OKLA. L. REV. 385, 387 (1965).

10. See *Sec. Trust & Savs. Bank v. Gleichmann*, 150 P. 908, 911 (Okla. 1915) (per curiam).

11. See Weintraub, *supra* note 1, § 3.1, at 52.

12. See *id.*

Title 15, section 162 of the Oklahoma Statutes belongs to the territorial category of choice-of-law theory because the law that governs a dispute is determined by a geographical location — either the place of performance or the place of making. However, section 162 does not fit neatly into the *lex loci contractus* framework as that rule is commonly understood. The *lex loci contractus* rule, stated above, requires the place of making to control all matters regarding the nature, validity, and interpretation of a contract, while section 162 emphasizes that the law of the place of performance should govern. Nevertheless, at least some Oklahoma courts understand section 162 to be a statutory embodiment of the *lex loci contractus* rule.¹³ However, this is not a universally accepted position.¹⁴ The discrepancy seems to depend on whether the term “*lex loci contractus*” is understood in its dual sense as defined by *Black’s Law Dictionary* or as meaning the choice-of-law rule articulated above.

This comment approaches section 162 without any opinion on the correct definition or scope of Latin terminology. Rather, the language of the statute is taken at face value. Therefore, if a contract expressly or implicitly indicates a place of performance, then the contract should be governed by the laws of that place. If no indication is made, then, and only then, should the place where the contract was made control. Whether this approach is consistent with the larger body of case law from other jurisdictions utilizing the *lex loci contractus* rule is not resolved here. The purpose of this comment is to make clear that title 15, section 162 of the Oklahoma Statutes *mandates* that the law of the place where the contract is to be performed controls the contract unless there is no indication in the agreement of a place of performance.

The universe of contractual choice-of-law jurisprudence in Oklahoma can be distilled into three categories — a general rule and two exceptions. Title 15, section 162 provides the general rule: “A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”¹⁵ While this rule controls the majority of Oklahoma’s contractual choice-of-law disputes, there are two recognized exceptions.

13. See *Bohannon*, ¶ 24, 820 P.2d at 795 (stating that section 162 is the statutory source of the *lex loci contractus* rule); see also *id.* ¶ 17, 820 P.2d at 793 (stating the *lex loci contractus* rule as “the nature, validity and interpretation of a contract is governed by the law where the contract is made”).

14. See *Panama Processes v. Cities Serv. Co.*, 1990 OK 66, ¶ 26, 796 P.2d 276, 287 (“Section 162 is not a declaration of the rule of *lex loci contractus*.”).

15. 15 OKLA. STAT. § 162 (2001).

The first exception was initially acknowledged by an Oklahoma court in *Collins Radio Co. v. Bell* and involves contracts for the sale of goods under Article II of the Uniform Commercial Code.¹⁶ The second exception was established by the Oklahoma Supreme Court in *Bohannon v. Allstate Insurance Co.* and applies to motor vehicle insurance contracts.¹⁷ For simplicity, these two exceptions will be referred to as the “UCC exception” and the “*Bohannon* exception,” respectively.¹⁸ These exceptions allow for the utilization of the “most significant relationship” test from the *Restatement (Second) of Conflict of Laws* (1971) in determining which law will govern the contract.¹⁹ The “most significant relationship” test is not applicable to contract disputes within the purview of the general statute,²⁰ although it may be applied in limited contexts, such as determining whether a contract’s choice-of-law provision is enforceable.²¹

Oklahoma courts will recognize the parties’ selection of a particular state’s law to control the agreement, whether explicit²² or implicit,²³ as long as the

16. See 1980 OK CIV APP 57, ¶ 14, 623 P.2d 1039, 1045, cited with approval in *Bohannon*, ¶ 24, 820 P.2d at 795; see also *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, ¶ 12, 81 P.3d 618, 625. Oklahoma’s codification of the U.C.C. Article 2 is found at 12A OKLA. STAT. §§ 2-101 *et seq.*

17. See *Bohannon*, ¶ 30, 820 P.2d at 797.

18. This comment focuses on the general rule; therefore, a detailed analysis of the U.C.C. and *Bohannon* exceptions is not undertaken here, although *Bohannon* is lightly discussed in Part II.A.4, *infra*. See Vicki Lawrence MacDougall, *Choice of Law Under the Code*, 8 OKLA. PRAC., PRODUCT LIABILITY LAW § 4:7 (2009 ed.), for a more detailed explanation of Oklahoma’s choice-of-law rules under the Uniform Commercial Code.

19. See *Bohannon*, ¶ 30, 820 P.2d at 797 (“The validity, interpretation, application and effect of the provisions of a motor vehicle insurance contract should be determined in accordance with the laws of the state in which the contract was made, unless those provisions are contrary to the public policy of Oklahoma, or unless the facts demonstrate that another jurisdiction has the most significant relationship with the subject matter and the parties.”) (emphasis added); *Ysbrand*, ¶ 12, 81 P.3d at 625 (“The ‘most significant relationship’ test applies to an action for breach of warranty in a sale of goods under Article 2 of the UCC.”).

20. See *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 14, 164 P.3d 1028, 1033-34 (holding that the general rule applies unless the contract falls into either the UCC or *Bohannon* exceptions). *But see* *Panama Processes v. Cities Serv. Co.*, 1990 OK 66, ¶¶ 9-30, 796 P.2d 276, 282-88 (applying the “most significant relationship” test as a secondary method of analysis to reach the same conclusion as was reached applying title 15, section 162 of the Oklahoma Statutes); MacDougall, *supra* note 18, § 4:7 (stating that there is doctrinal support for practitioners to argue the “most significant relationship” approach in ordinary contract cases).

21. See *Dean Witter Reynolds, Inc. v. Shear*, 1990 OK 67, ¶ 7, 796 P.2d 296, 299.

22. See, e.g., *Carmack v. Chem. Bank N.Y. Trust Co.*, 1975 OK 77, 536 P.2d 897; see also *Webster*, *supra* note 9, at 386.

23. See *Atchison, T. & S. F. Ry. Co. v. Smith*, 1913 OK 162, ¶ 16, 132 P. 494, 497 (applying the law of Oklahoma to an agreement entered into in Kansas because there was a

selected *law* is not contrary to Oklahoma's established public policy.²⁴ Additionally, Oklahoma law will govern a contract that would otherwise be controlled by another state's law if the *contract* is repugnant to Oklahoma's established law or public policy.²⁵

In order to resolve the question of which place of performance should govern when a contract contemplates multiple places of performance and the parties have not made a choice of law, it is important to first conduct a survey of important cases in Oklahoma's contractual choice-of-law jurisprudence in order to illustrate the aforementioned rules and how they developed. Although the cases appear to be inconsistent, a complete understanding of Oklahoma's contractual choice-of-law jurisprudence helps reconcile the "place of making" and "place of performance" rules. Additionally, several deficiencies and unresolved questions from the case law are illuminated.

A. Survey of Oklahoma Contractual Choice-of-Law Jurisprudence

The current form of title 15, section 162 of the Oklahoma Statutes has remained completely unchanged since before Oklahoma's statehood.²⁶ The same cannot be said for the case law.²⁷ There is "confusion" — noted by commentators²⁸ and realized by practitioners in this area of law — that has continued forward into modern jurisprudence. In the following pages, selected contractual choice-of-law cases will be grouped and discussed according to common themes present in the opinions and by the date in which those cases were decided.

clear manifestation of a mutual intention to apply Oklahoma law); *see also* Webster, *supra* note 9, at 386.

24. *See Dean Witter Reynolds, Inc.*, ¶ 6 n.12, 796 P.2d at 299 n.12 (stating that a choice-of-law clause may be invalidated if: (a) application of the chosen law is "contrary to a fundamental policy" of a state with a greater interest in the controversy, and (b) that state's law would govern absent a choice-of-law provision in the contract)(emphasis omitted) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

25. *See Pate v. MFA Mut. Ins. Co.*, 1982 OK CIV APP 36, ¶ 11, 649 P.2d 809, 811 (stating that "general rule" does not apply if the law of that place is "contrary to the law or public policy of the state" where enforcement is sought).

26. *See* STAT. 1890, § 864; R.L. 1910, § 956; COMP. STAT. § 5049 (1921) ("A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.").

27. It is interesting to note the lack of reference to the statutory directive for interpreting contracts until 1926 in *Turman Oil Co. v. Sapulpa Refining Co.*, 1926 OK 747, ¶ 5, 254 P. 84, 86 (per curiam) (citing COMP. STAT. § 5046 (1921)).

28. *See, e.g., MacDougall, supra* note 18, § 4:7 ("Oklahoma law is simply confused regarding the choice-of-law theory in contract cases.").

1. The Foundational Cases and the Implied Intent of the Parties

According to one Oklahoma commentator, the “well-reasoned” choice-of-law rules are those which inquire into the intent of the parties when selecting which law will govern a contract.²⁹ The first decisions in Oklahoma’s choice-of-law jurisprudence support this contention by hinging the selection of a jurisdiction’s law on an inquiry into the “implied intent” of the parties.

In 1895, the Supreme Court of the Territory of Oklahoma was faced with the question of which law to apply to a chattel mortgage in the case of *Richardson v. Shelby*.³⁰ The question was whether the law of Kansas, where the property was located at the time the chattel mortgage was executed,³¹ or the law of Oklahoma, where the property was subsequently moved to,³² would apply. The court concluded that Kansas law would govern the dispute and set out the following rule: “The law is that the rights of the parties to a contract are to be determined by the law as it exists in the state or country *where the contract is to be performed*.”³³ Because the mortgagor was a resident of Kansas and the property being mortgaged was in Kansas at the time, the court inferred that the contract “referenced” the law of Kansas.³⁴ The court concluded that by referencing the state of Kansas the parties had indicated that Kansas was the place of performance.³⁵ While not mentioning the “implied intent of the parties” expressly, the court’s conclusion appears to find that the parties intended for the law of Kansas to govern because of the domicile of the parties and the locus of the land involved.

The next installment in the Territorial Court’s fledgling contractual choice-of-law jurisprudence came the following year in *Jaffrey & Co. v. Wolf*.³⁶ The question in that case revolved around a sale of goods to be shipped from New York to Guthrie and Oklahoma City.³⁷ The court found that New York’s law should be applied because virtually the entire transaction — including negotiation, payment and delivery — took place there.³⁸ The court noted that the defendants (buyers) took possession of the goods in New York City and concluded the transaction was completed upon the seller’s delivery of the goods to the railroad station.³⁹ Another rule of law was set out by the court as

29. See Webster, *supra* note 9, at 385, 389.

30. 1895 OK 48, 41 P. 378.

31. See *id.* ¶¶ 3-4, 41 P. at 379-80.

32. See *id.* ¶ 4, 41 P. at 379-80.

33. *Id.* ¶ 17, 41 P. at 380 (emphasis added).

34. See *id.*

35. See *id.*

36. 1896 OK 73, 47 P. 496.

37. See *id.* ¶ 47, 47 P. at 502.

38. See *id.*

39. See *id.*

follows: “[t]he rule is that *the place of the contract* governs the terms of the contract, and will also govern as to all facts determining the maturity of the amount due.”⁴⁰

At first glance, the rules from *Richardson* and *Jaffrey* may appear to be in conflict with each other. However, “the place of the contract” language used by the court in *Jaffrey* does not necessarily mean “the place of making.”⁴¹ Rather, “the place of the contract” is a conclusion of which law will govern the contract — sometimes the term is used to designate the place of making, and sometimes it is used to reference the place of performance.⁴² In *Jaffrey*, the distinction was moot because the place of performance and the place of making were the same.⁴³ The court’s emphasis on the completion of the sale in New York, however, indicates that it did not intend for this rule to be contrary to its prior pronouncement in *Richardson*.

In 1913, the Supreme Court of Oklahoma continued to apply the law of the place of performance, albeit with a new twist which introduced into Oklahoma’s jurisprudence a more rigid rule originating from neither the statute nor previous Oklahoma case decisions.⁴⁴ *Atchison, T. & S. F. Railway Co. v. Smith* was a case involving a free train pass for roundtrip travel between Wellington, Kansas, and Perry, Oklahoma.⁴⁵ The pass contained a provision that was signed by the plaintiff disclaiming liability for accidental injury.⁴⁶ The plaintiff was injured on the trip and sought damages for personal injury.⁴⁷ Kansas law would have invalidated the provision and allowed the plaintiff to recover; Oklahoma law would uphold the agreement’s validity.⁴⁸

The court concluded the law of Oklahoma should govern the contract for two reasons.⁴⁹ First, Oklahoma was the place where the contract was to be “principally performed” because most of the journey occurred there.⁵⁰ Second, Oklahoma law should govern the agreement because the parties were *presumed to have intended* that their engagement be valid.⁵¹

40. *Id.* ¶ 48, 47 P. at 502 (emphasis added).

41. *See id.* This illusion of conflict is doubtless spurred by the countless and varied judicial interpretations of “*lex loci contractus*.”

42. *See* Sec. Trust & Savs. Bank v. Gleichmann, 150 P. 908, 911 (Okla. 1915) (per curiam).

43. *See Jaffrey*, ¶¶ 47-48, 47 P. at 502.

44. *See* Atchison, T. & S. F. Ry. Co. v. Smith, 1913 OK 162, 132 P. 494.

45. *See id.* ¶ 2, 132 P. at 495.

46. *See id.*

47. *Id.* ¶¶ 1-2, 132 P. at 495.

48. *See id.* ¶¶ 3, 8, 132 P. at 495-96.

49. *See id.* ¶ 8, 132 P. at 496.

50. *See id.* Wellington is only a “short distance north of the Oklahoma border” while Perry is over 50 miles south of the state line. *Id.* ¶ 2, 132 P. at 495.

51. *See id.* ¶ 10, 132 P. at 496.

In looking to these factors, the court seemed most concerned with the intent of the parties at the time of contracting.⁵² Absent this implied intent, the court stated that it would have to resort to the “legal fiction” that the law of the place where the contract was made should be looked to in order to determine its validity.⁵³ In fact, the court articulated a rule quite distinct from any used previously in the state:⁵⁴

[C]ontracts are to be governed as to their nature, and their validity, and their interpretation, *by the laws of the place where they were made*, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the laws of some other state or country.⁵⁵

While the ultimate holding did not rest on this rule, the concept that the nature, validity, and interpretation of a contract are to be governed by the place of making has persisted in Oklahoma’s case law.⁵⁶

In *Security Trust & Savings Bank v. Gleichmann*,⁵⁷ the Oklahoma Supreme Court continued to give effect to the “presumed intention” of the parties when it determined that two bank notes were to be governed by the laws of Iowa instead of Oklahoma.⁵⁸ It also continued to resolve contractual conflict-of-law questions without reference to the statute directing which law should govern.⁵⁹ Although there was a factual dispute about where the notes were actually executed,⁶⁰ the court largely disregarded this detail and held the implied intent

52. *See id.* ¶¶ 9-16, 132 P. at 496-97.

53. *See id.* ¶ 9, 132 P. at 496.

54. In his note as part of the 1965 Conflict of Laws Symposium, Kenneth Webster referred to the “place of making” approach as the “oldest and most rigid view.” *See Webster, supra* note 9, at 385. While this is an accurate statement from the perspective of the country as a whole, it is not so for Oklahoma’s jurisprudence. Webster cites only one case predating *Atchison*, and that case does not apply the “place of making” rule in the way Webster contemplates. *See id.* (citing *W. Union Tel. Co. v. Pratt*, 1907 OK 43, ¶ 0, 89 P. 237, 237). Rather, the contract in question in *Pratt* was stipulated as “an Indian Territory contract” and the court determined that the laws applicable to Indian Territory at the time the contract was made were incorporated into the contract. *See W. Union Tel. Co.*, ¶ 3, 89 P. at 237.

55. *Atchison*, ¶ 8, 132 P. at 496 (citing *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889) (emphasis added)).

56. *See, e.g.*, *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 17, 820 P.2d 787, 793; *Telex Corp. v. Hamilton*, 1978 OK 32, ¶ 8, 576 P.2d 767, 768; *Clark v. First Nat’l Bank*, 1916 OK 404, ¶ 9, 157 P. 96, 98 (per curiam).

57. 150 P. 908 (1915) (per curiam).

58. *See id.* at 911.

59. *See id.* at 910-11.

60. *See id.* at 909.

of the parties was for the law of Iowa to govern because the notes were to be performed there.⁶¹

Interestingly, the court held that a contract which is made in one place but is to be performed in another should be governed by the law of the place of *performance* “as to its validity, nature, obligation, and interpretation.”⁶² This articulation of the rule stands in stark contrast to the rule previously espoused in *Atchison*.⁶³ Both holdings focused on the “presumed” or “implied” intent of the parties at the time of contracting. However, if the court had applied the rule from *Atchison* — that the place of making governs a contract absent a clear manifestation of mutual intent by the parties that another law governs⁶⁴ — to the facts in *Gleichmann*, it would have likely reached a contrary result. At trial, a jury found that the notes were executed in Okarche, Oklahoma, to the Hart-Parr company, as the defendant contended.⁶⁵ If the jury also agreed with *Gleichmann* that the notes were made and delivered in Oklahoma, it is very plausible that they would not have found an implied intention for Iowa law to govern.⁶⁶ Applying the *Atchison* rule, Oklahoma law would have governed the bank notes because it was the place of making.⁶⁷

61. *See id.* at 911.

62. *Id.*; *see also* *Legg v. Midland Savs. & Loan Co.*, 1916 OK 46, ¶ 3, 154 P. 682, 684 (per curiam) (“[C]ontracts made in one place to be performed in another are governed by the law of the place of performance . . .”).

63. *Compare Atchison, T. & S. F. Ry. Co. v. Smith*, 1913 OK 162, ¶ 8, 132 P. 494, 496 (“[C]ontracts are to be governed as to their nature, and their validity, and their interpretation, by the laws of the place where they were made . . .”), *with Gleichmann*, 150 P. at 911 (holding that the bank notes should be governed by the law of the place of performance as to their “validity, nature, obligation, and interpretation”).

64. *See Atchison*, ¶ 8, 132 P. at 496.

65. *See Gleichmann*, 150 P. at 909-10. This conclusion is inferred from the fact that the jury found in favor of *Gleichmann* at trial based upon the trial judge’s instruction that the notes were an Oklahoma contract if the jury found them to have been executed in Oklahoma.

66. *But cf. id.* at 908 (stating in the Syllabus by the court that the notes should be governed by the law of Iowa in part because Iowa law would recognize the notes as negotiable). First, this holding only occurs in the Syllabus by the court and does not merit discussion in the actual opinion. Second, it seems that “negotiable” here does not mean “valid” but rather implies a sense of transferability after being issued. However, it may be the case that the parties are presumed to have intended the notes to be negotiable, similar to how the parties in *Atchison* were presumed to intend the exculpatory clause to be valid.

67. This would be true unless the Court were to view the rule in *Gleichmann* as a means of determining the implied intent of the parties for purposes of the rule articulated in *Atchison*.

2. *Clark and Telex Corp.: The Misunderstood Cases*

The two cases discussed here are often cited by Oklahoma courts for the rule that “the nature, validity, and interpretation of a contract are governed by the law” of the place where the contract was made.⁶⁸ However, while that rule is reflected in these decisions, neither holding rested upon it. Therefore, formalistic application of this “place of making” rule is misguided.

A year after deciding *Gleichmann*, the Oklahoma Supreme Court entered an opinion in *Clark v. First National Bank*,⁶⁹ which provided for a three-tiered analysis of which law would govern a contract.⁷⁰ The court stated:

The general rule of law is, that matters bearing upon the execution, interpretation, and the validity of a contract are determined by the law of the place where the contract is made; matters connected with its performance are regulated by the law of the place of performance; matters respecting the remedy depend upon the law of the place where the remedy is sought to be enforced.⁷¹

The court subsequently noted that “[t]he first and second rules may be open to some criticism, but the third is universally admitted to be true.”⁷²

At issue in *Clark* was whether the plaintiff (the bank) pursued the proper remedy in foreclosing on its chattel mortgage.⁷³ The court ultimately concluded that the bank did pursue an appropriate remedy and dismissed Clark’s contention that Illinois law should govern the issue.⁷⁴

No discussion was given to the first two tiers of the “general rule” that the court set out in the opinion, and the holding in no way rested upon them.⁷⁵ In fact, as mentioned previously, the court even stated that there is some discrepancy as to their acceptance.⁷⁶ Nevertheless, Oklahoma courts have

68. *See* *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 17, 820 P.2d 787, 793; *see, e.g.*, *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 14 n.22, 164 P.3d 1028, 1033-34 n.22.

69. 1916 OK 404, 157 P. 96 (per curiam).

70. *See id.* ¶ 9, 157 P. at 98.

71. *Id.*

72. *Id.* (internal quotations marks omitted); *contra* Webster, *supra* note 9, at 388-89 (stating that such a contention “is definitely incapable of any support from the better-reasoned choice of law theories”).

73. *See Clark*, 1916 OK 404, ¶ 13, 157 P. at 99.

74. *See id.* ¶ 14, 157 P. at 99 (determining that the law of Kansas, where the foreclosure was sought, governed as to whether the foreclosure was appropriate instead of the law of Illinois, where the chattel mortgage was executed).

75. *See id.* ¶¶ 9-14, 157 P. at 98-99.

76. *See id.* ¶ 9, 157 P. at 98.

continued to cite *Clark* for the proposition that the place of making governs with respect to a contract's nature, validity, and interpretation.⁷⁷

After *Clark*, the Oklahoma Supreme Court temporarily reverted to using "the place of performance" rule.⁷⁸ However, in *Telex Corp. v. Hamilton*, the Oklahoma Supreme Court revived the rule from *Clark*.⁷⁹ At issue was whether the law of Oklahoma or the law of Florida governed a contract whereby the plaintiff, a resident of Florida, agreed to represent the defendant, a Tulsa corporation, in negotiations with one of its "lost" debtors.⁸⁰ The plaintiff was to receive 25% of any amount collected up to \$25,000.⁸¹ The court first noted that the contract itself provided that Oklahoma law would apply.⁸² Furthermore, the contract was entered into in Oklahoma and was to be performed in Oklahoma.⁸³ Additionally, the court found that Oklahoma law would apply absent a choice-of-law provision in the contract and stated "the general rule of law is that the law *where the contract is made* or entered into governs with respect to its nature, validity, and interpretation."⁸⁴

Despite its previous recognition of section 162 in *Paclawski v. Bristol Laboratories, Inc.*,⁸⁵ the court decided this choice-of-law question without reference to the statute.⁸⁶ However, the outcome would not have been different because, as the court mentioned, the contract was performed in Oklahoma.⁸⁷ Additionally, this decision acknowledged that parties can include a choice-of-law provision in their contract⁸⁸ and contemplated that a contract provision could be void if violative of Oklahoma's public policy.⁸⁹

Telex Corp. is not particularly significant because of its holding — nothing in the court's conclusion was inconsistent with its prior precedent. However,

77. See, e.g., *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 17, 820 P.2d 787, 793; *Telex Corp. v. Hamilton*, 1978 OK 32, ¶ 8, 576 P.2d 767, 768.

78. See, e.g., *Collins v. Holland*, 1934 OK 404, ¶ 15, 34 P.2d 587, 588 (per curiam) ("[T]he law of the place where a contract is to be performed is the law which governs in determining its validity.").

79. See 1978 OK 32, ¶ 8, 576 P.2d at 768.

80. See *id.* ¶¶ 3, 7, 576 P.2d at 768.

81. See *id.* ¶ 4, 576 P.2d at 768.

82. *Id.* ¶ 7, 576 P.2d at 768.

83. *Id.*

84. *Id.* ¶ 8, 576 P.2d at 768 (citing *Clark v. First Nat'l Bank*, 157 P. 96, 98 (Okla. 1916) (per curiam)) (emphasis added).

85. See 1967 OK 21, ¶ 5, 425 P.2d 452, 453-54 (per curiam).

86. See generally *Telex Corp.*, 1978 OK 32, 576 P.2d 767.

87. See *id.* ¶ 7, 576 P.2d at 768.

88. See *id.* ¶ 8, 576 P.2d at 768; see also *Carmack v. Chem. Bank N.Y. Trust Co.*, 1975 OK 77, ¶ 8, 536 P.2d 897, 899 ("[A] contract may provide *the choice of law* under which it is to be governed . . .").

89. See *Telex Corp.*, ¶ 10, 76 P.2d at 768-69.

the language of the rule articulated in *Telex Corp.*, which was derived from the holding in *Clark*, is inconsistent with a majority of the court's prior decisions. Subsequent court opinions have cited *Telex Corp.* as setting the rule that contracts are to be governed by the law of the place of making.⁹⁰ A rigid application of this rule is not accurate when considering the court's prior emphasis on the intent of the parties and the place of performance, the facts upon which *Telex Corp.* was decided, and the plain language of title 15, section 162 of the Oklahoma Statutes.

3. Cases Relying on Section 162 and Emphasizing the Place of Performance Rule

In *Monahan v. New York Life Insurance Co.*,⁹¹ the federal district court for the Western District of Oklahoma was tasked with deciding whether several life insurance policies were governed by the laws of New York, where the policies were to be performed,⁹² or Arkansas, their place of making.⁹³ The court first articulated the "well established rule" that matters bearing on a contract's performance are governed by the law of the place of performance; matters concerning the remedy by the law of the forum; and matters relating to the execution, interpretation, and validity of a contract by the law of the place of making.⁹⁴ This rule is identical to the one expressed by the Oklahoma Supreme Court in *Clark v. First National Bank*,⁹⁵ although the district court paid no homage to that decision. Instead, the district court utilized the place of performance rule after it recognized that pursuant to the *Erie* doctrine it must apply the law of the state in which it sits when determining choice-of-law issues.⁹⁶ Citing section 5047 of the 1931 Oklahoma Compiled Statutes,⁹⁷ the district court concluded that "the law of the place of contract, *lex loci*

90. *E.g.*, *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 17, 820 P.2d 787, 793; *Pate v. MFA Mut. Ins. Co.*, 1982 OK CIV APP 36, ¶ 11, 649 P.2d 809, 811.

91. 26 F. Supp. 859 (W.D. Okla. 1939), *aff'd*, 108 F.2d 841 (10th Cir. 1939).

92. The life insurance policies were to be performed in New York because they were made payable, on their face, at the insurance company's home office in New York, New York. *See id.* at 861.

93. *Id.*

94. *Id.*

95. *See* 1916 OK 404, ¶ 9, 157 P. 96, 98 (per curiam).

96. *See Monahan*, 26 F. Supp. at 861-62.

97. *Compare id.*, with 15 OKLA. STAT. § 162 (2001). Both the 1931 and 2001 version state: "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." *See* 15 OKLA. STAT. § 162; COMP. STAT. § 9470 (1931).

contractus, must yield to the law of the place of performance, although it may be contrary to the established principles of common law and usage.”⁹⁸

Although one Oklahoma court had cited the statute previously,⁹⁹ *Monahan* is the first time any court undertook a choice-of-law analysis using the text of Oklahoma’s choice-of-law statute.¹⁰⁰ In making its choice-of-law determination, the district court only referenced the statute and disregarded Oklahoma’s case law.¹⁰¹

In 1944, the United States Court of Appeals for the Tenth Circuit likewise applied title 15, section 162 of the Oklahoma Statutes¹⁰² to a dispute over a crop-share lease executed in Arkansas where the leased land was located in Sequoyah County, Oklahoma.¹⁰³ In *McCraw v. Simpson*, the court determined Oklahoma law should govern the crop-share lease because the land was located in Oklahoma and, therefore, the lease was to be performed in Oklahoma.¹⁰⁴ Additionally, the court noted that such an outcome is not inconsistent with Oklahoma case law,¹⁰⁵ something the district court in *Monahan* neglected to do. Similar to *Monahan*, however, there is no mention of the three-tiered rule from *Clark v. First National Bank* or the cases citing it.¹⁰⁶

98. *Monahan*, 26 F. Supp. at 862. *But see* *Consol. Flour Mills Co. v. File Bros. Wholesale Co.*, 110 F.2d 926, 927-29 (10th Cir. 1940) (citing, *inter alia*, *Clark*, ¶ 9, 157 P. at 98, for the rule that a contract’s nature, validity, and interpretation are governed by the law of the place of its making unless it appears that the parties intended to be bound by the law of another place). Despite using the *Clark* rule, this decision is not out of line with the Oklahoma statute because the flour was to be manufactured in the state of Kansas and the contract’s express terms provided that delivery of the flour to the carrier would constitute delivery to the File brothers; therefore, performance was to occur in Kansas. *See id.* at 929.

99. *See Turman Oil Co. v. Sapulpa Refining Co.*, 1926 OK 747, ¶ 13, 254 P. 84, 87 (per curiam) (citing COMP. STAT. § 5049 (1921) for the rule “that a contract is to be interpreted [by] the law and usage of the place where it is to be performed.”). Section 5049 of the 1921 compiled statutes is identical in language to the form of 15 OKLA. STAT. § 162. *Compare* COMP. STAT. § 5049 (1921), with 15 OKLA. STAT. § 162 (2001). However, in *Turman Oil Co.* the statute was not used in a choice-of-law context but rather was cited as an interpretive device with emphasis on the word “usage.” *See Turman Oil Co.*, ¶ 13, 254 P. at 87.

100. *See Monahan*, 26 F. Supp. at 862.

101. *See id.* (discussing a case from the federal district court for the Southern District of California which applied an identical statute and reached the same conclusion).

102. 15 OKLA. STAT. § 162 (1941). The 1941 main volume is the first volume of statutes utilizing the title-and-section designation.

103. *See McCraw v. Simpson*, 141 F.2d 789, 790 (10th Cir. 1944).

104. *Id.*

105. *Id.* (citing, *inter alia*, *Sec. Trust & Savs. Bank v. Gleichmann*, 150 P. 908 (1915) (per curiam)).

106. *Compare id.*, with *Consol. Flour Mills v. File Bros. Wholesale Co.*, 110 F.2d 926, 929 (10th Cir. 1940) (applying the rule from *Clark v. First Nat’l Bank*, 1916 OK 404, 157 P. 96 (per

It is worth noting that up until the late 1960s, there were no Oklahoma *state* court decisions which rested upon, or even mentioned, the choice-of-law statute when deciding a choice-of-law issue. The two cases discussed immediately above were both decided by federal courts applying Oklahoma law. However, this state of affairs changed in 1967 when the Oklahoma Supreme Court entered its decision in *Paclawski v. Bristol Laboratories, Inc.*¹⁰⁷

In *Paclawski*, the contract in question was a settlement agreement on an underlying tort claim against the developer of a prescription drug, among other defendants.¹⁰⁸ There was no dispute between the parties that Arkansas law governed the contract, but the court took the time to mention that the contract was “executed and performed” in Arkansas and cited, *inter alia*, title 15, section 162 of the Oklahoma Statutes.¹⁰⁹

In 1990, the Oklahoma Supreme Court decided a case of significant importance to the thesis of this comment because the case involved a contract which indicated two places of performance.¹¹⁰ In *Panama Processes v. Cities Service Co.*, the court was faced with determining whether New York or Brazilian law applied to an agreement between a minority shareholder (plaintiff) and the majority shareholder (defendant) of a Brazilian corporation.¹¹¹ The contract in question was a letter of agreement negotiated and signed in New York which provided the plaintiff with assurances from the defendant concerning the future operational policies of the Brazilian corporation, including the payment of dividends.¹¹²

Justice Opala, writing for the majority, conducted a two-tiered choice-of-law analysis finding that Brazilian law should govern the agreement.¹¹³ The first tier of the analysis was grounded upon the text of title 15, section 162 of the Oklahoma Statutes whereby the law of the place of making would govern

curiam), to a contract for the purchase of flour).

107. 1967 OK 21, 425 P.2d 452 (per curiam).

108. *See id.* ¶¶ 1-2, 425 P.2d at 453.

109. *See id.* ¶ 5, 425 P.2d at 453-54. It is unclear from the opinion what constitutes performance in a settlement agreement, but it stands to reason that performance and execution are one and the same because there is a giving-up of the rights to a lawsuit in exchange for money. However, it may be the case that if the agreement had designated a different location as the place of payment of the settlement money, then that location might be considered the place of performance.

110. *See Panama Processes v. Cities Serv. Co.*, 1990 OK 66, ¶ 27, 796 P.2d 276, 287-88. The only other Oklahoma case that chooses one place of performance over another is *Atchison, T. & S. F. Ry. Co. v. Smith*. *See* 1913 OK 162, ¶ 8, 132 P. 494, 496.

111. *See* 1990 OK 66, ¶ 2, 796 P.2d at 278-79.

112. *Id.* ¶ 2, 796 P.2d at 279.

113. *See id.* ¶ 1, 726 P.2d at 276.

only if there was no indication in the contract where performance was to occur.¹¹⁴ Justice Opala was very critical of the notion that section 162 was an embodiment of the common law rule of *lex loci contractus*, and instead emphasized that *lex loci solutionis*, the law of the place of performance, was the default rule in Oklahoma.¹¹⁵

The court concluded that the letter agreement did indicate that “the contract was to be performed in major part in Brazil” because the corporation’s future expansion and dividend distribution had to occur in Brazil and the agreement was by its own terms subject to the business climate in Brazil.¹¹⁶ The court noted, however, that some performance under the agreement had to occur in New York because New York was defendant’s principal place of business and decisions concerning the agreement would be made at that place.¹¹⁷ These decisions were considered insignificant when compared with the performance which had to occur in Brazil because the agreement indicated that the parties intended for the law of Brazil to govern the validity and enforcement of the contract.¹¹⁸ Significant to the court’s opinion here was not only the emphasis on the text of title 15, section 162 of the Oklahoma Statutes, but also the conclusion that the parties intended for Brazil law to govern.¹¹⁹

The second tier of the court’s analysis was to determine which place had the “most significant relationship” to the parties and the transaction.¹²⁰ The court concluded that Brazil had the most significant relationship to the transaction because of the agreement’s conflict with Brazilian law.¹²¹ However, before conducting its analysis the court noted that it was not expressing an opinion on whether the “most significant relationship” test should apply; rather, it just concluded that even if it did, Brazil law would still govern the letter agreement.¹²² A detailed examination of the court’s analysis here is unwarranted because the court entered a later opinion which explicitly held

114. *See id.* ¶ 26, 796 P.2d at 287.

115. *See id.*; *contra Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1417, 1420 n.5 (10th Cir. 1985); Webster, *supra* note 9, at 385 (stating that Oklahoma’s “place of making” and “place of performance” rules are embodied in section 162).

116. *See Panama Processess v. Cities Serv. Co.*, 1990 OK 66, ¶ 27, 796 P.2d 276, 288.

117. *See id.*

118. *See id.*

119. *See id.* This was the first inquiry by an Oklahoma state court into the implied intent of the parties since *Security Trust & Savings Bank v. Gleichmann*. *See* 150 P. 908 (1915) (*per curiam*).

120. *See Panama Processes*, ¶ 28, 796 P.2d at 288.

121. *Id.* ¶ 30 n.52, 796 P.2d at 288 n.52 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) cmt. e (1971)).

122. *See id.* ¶ 28 n.50, 796 P.2d at 288 n.50.

that the “most significant relationship” test does not apply to general contract choice-of-law disputes.¹²³

4. Motor Vehicle Insurance Contracts and the Bohannon Exception

Motor Vehicle Insurance contracts present unique choice-of-law difficulties because of the mobility of automobiles and the varying legislation of the several states.¹²⁴ As a result, the Oklahoma Supreme Court has established a choice-of-law rule specifically applicable to these contracts.¹²⁵ This rule applies the law of the place where the contract was made unless: 1) Provisions of the contract are contrary to Oklahoma public policy, or 2) Another jurisdiction is demonstrated to have “the most significant relationship with the subject matter and the parties.”¹²⁶ Most of the motor vehicle insurance cases following *Bohannon v. Allstate Insurance Co.*, where this exception was established, have focused on the scope and operation of the public policy exception.¹²⁷

This comment does not engage in an analysis of motor vehicle insurance cases following *Bohannon* because their choice-of-law questions are resolved by the aforementioned exception. However, the two cases leading up to the *Bohannon* decision are useful because they fell within the purview of the general rule embodied in title 15, section 162 of the Oklahoma Statutes at the time they were decided.¹²⁸ Additionally, *Bohannon* helps to identify choice-of-law questions left unresolved by the Oklahoma courts and is otherwise seminal to Oklahoma’s choice-of-law jurisprudence; therefore, a comment on these rules would be incomplete without including a brief discussion on *Bohannon*.¹²⁹

In 1982, the Oklahoma Court of Appeals was tasked with determining whether an automobile insurance policy which contained a subrogation clause was governed by the law of Oklahoma or Arkansas.¹³⁰ In *Pate v. MFA Mutual Insurance Co.*, the plaintiff/insured was a resident of Arkansas who had obtained an automobile insurance policy in that state.¹³¹ Plaintiff and his

123. See *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 14, 164 P.3d 1028, 1033-34.

124. See *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 25, 820 P.2d 787, 795.

125. See *id.* ¶ 30, 820 P.2d at 797.

126. *Id.*

127. See, e.g., *Burgess v. State Farm Mut. Auto. Ins. Co.*, 2003 OK CIV APP 85, ¶¶ 6-13, 16-18, 77 P.3d 612, 613-15.

128. See generally *Pate v. MFA Mut. Ins. Co.*, 1982 OK CIV APP 36, 649 P.2d 809; *Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416 (10th Cir. 1985).

129. See generally *Bohannon*, 1991 OK 64, 820 P.2d 787.

130. See *Pate*, ¶¶ 9-10, 649 P.2d at 811.

131. See *id.* ¶ 2, 649 P.2d at 810.

family were involved in an accident on Interstate 35 near Davis, Oklahoma, and brought this suit to recover approximately \$4,000 from his insurance company (defendant) subsequent to settling with the third-party tortfeasor.¹³² The defendant refused payment based upon a provision in the policy that provided the insurer with a right of reimbursement or “set-off” equal to any amount recovered from third parties.¹³³ The set-off provision was valid under Arkansas law; however, Oklahoma had a statute invalidating all such provisions which are “effective in this state.”¹³⁴

The precise issue before the court was whether the set-off provision was contrary to Oklahoma public policy in a way sufficient to justify the application of Oklahoma law to a contract that would otherwise be governed by the law of Arkansas.¹³⁵ In reaching its decision, the court of appeals cited *Telex Corp. v. Hamilton*¹³⁶ and *Clark v. First National Bank*¹³⁷ for the rule that a contract will be governed by the laws of the state where it was made unless either agreed to by the parties or “contrary to the law or public policy of the state where enforcement of the contract is attempted.”¹³⁸ The court concluded that the Oklahoma legislature intended for the subrogation limitation statute to apply to all vehicles traveling on Oklahoma highways; therefore, the provision in the insurance policy violated Oklahoma law and was deemed invalid.¹³⁹

In conducting its analysis in *Pate*, the court of appeals made no reference to the statutory directive in title 15, section 162 of the Oklahoma Statutes, and it avoided an inquiry into the place where the insurance policy was to be performed.¹⁴⁰ Performance for an automobile insurance policy might be considered the place where the premiums or benefits are paid.¹⁴¹ However, it

132. *See id.* ¶¶ 3-5, 649 P.2d at 810.

133. *See id.* ¶ 6, 649 P.2d at 810.

134. *See id.* ¶ 7, 649 P.2d at 810-11 (citing 36 OKLA. STAT. § 6092 (1981)).

135. *See id.* ¶¶ 8, 11-14, 649 P.2d at 811-12.

136. 1978 OK 32, 576 P.2d 767.

137. 1916 OK 404, 157 P. 96 (per curiam).

138. *Pate*, ¶ 11, 649 P.2d at 811. Additionally, the court noted the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) and set out section 6, but it did not engage in any analysis dependent upon that section or inquire which place had “the most significant relationship” to the dispute. *See generally id.* ¶¶ 12-13, 649 P.2d at 811.

139. *Pate*, ¶¶ 14-15, 649 P.2d at 812 (relying in part on RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b (1971)).

140. *See id.* ¶¶ 11-14, 649 P.2d at 811-12. It is interesting to note that the court quoted RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment a, stating: “The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so.” *Id.* ¶ 13, 649 P.2d at 811. Despite this language in the comment, the court neglected to make any reference to Oklahoma’s statutory directive. *See id.*

141. *Cf. Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416, 1420 (10th Cir. 1985) (“In the

may also be the case under Oklahoma law that the parties to such a policy do not contemplate a place of performance when entering into the agreement; or that they have not “indicated” one within the meaning of section 162 without an express designation.¹⁴²

In *Rhody v. State Farm Mutual Insurance Co.*, the Tenth Circuit was tasked with applying Oklahoma’s choice-of-law rules to an automobile insurance policy.¹⁴³ The plaintiffs/insured were residents of Texas and held a Texas insurance policy that covered three vehicles.¹⁴⁴ One of the covered vehicles was garaged in Oklahoma by their son, an Oklahoma resident.¹⁴⁵ This vehicle was involved in an accident in Oklahoma with an uninsured Oklahoma driver.¹⁴⁶ This dispute arose when the plaintiffs tried to claim that Oklahoma law governed the contract and entitled them to stack the uninsured/underinsured motorist (hereinafter “UM”) coverage for each of their three vehicles for total recovery of \$30,000 from the defendant insurer.¹⁴⁷ Defendant maintained that Texas law applied because the policy was executed there; Texas did not stack UM benefits and recovery would be limited to \$10,000.¹⁴⁸

Two choice-of-law issues were presented to the Tenth Circuit for determination in this case.¹⁴⁹ The first was whether Oklahoma was trending away from the *lex loci contractus* rule in favor of the more modern “most significant relationship” test.¹⁵⁰ The Tenth Circuit deferred to the district

context of insurance policies, we have held that the specification of a place for payment of premiums and benefits under the policy signifies the parties’ designation of that location as the place of performance of the contract.”). While *Rhody* looked to payment of benefits and premiums to determine place of performance, there is no reason that each could not independently suffice as a place of performance. The contract could then specify multiple places of performance, and conflicts would be resolved according to the proposal made later in this article.

142. See *infra* Part IID for discussion regarding the possible constructions of the term “interpretation” in section 162.

143. 771 F.2d 1416, 1417 (10th Cir. 1985).

144. See *id.*

145. See *id.*

146. See *id.*

147. See *id.* at 1417-18.

148. See *id.* at 1418.

149. See *id.* at 1418-20.

150. *Id.* at 1418. Plaintiffs argued that the Oklahoma Supreme Court’s adoption of the “most significant relationship” test for tort conflict-of-laws determinations in *Brickner v. Gooden*, 1974 OK 91, 525 P.2d 632, coupled with the court of appeal’s decision to apply the same test to disputes under the U.C.C in *Collins Radio Co. v. Bell*, 1980 OK CIV APP 57, 623 P.2d 1039, demonstrated a shift toward applying the “most significant relationship” test to all choice-of-law disputes. See *Rhody*, 771 F.2d at 1418.

court's determination that Oklahoma had not adopted the "most significant relationship" test for general contract disputes.¹⁵¹

The second issue before the Court of Appeals was whether the insurance policy indicated a place of performance sufficient to preempt the application of the law of the place of making.¹⁵² The court concluded that Texas law applied because there was no indication in the contract of where performance was to occur, nor was there any indication, express or implied, that the parties intended for a certain law to govern.¹⁵³ In reaching this conclusion, the court rejected the plaintiffs' contention that the place of performance for the policy was "the place where the liability of the uninsured motorist is determined."¹⁵⁴

The Tenth Circuit recognized both the existence of title 15, section 162 of the Oklahoma Statutes and Oklahoma's varied case law applying both the "place of performance" and "place of making" rules.¹⁵⁵ However, the court indicated that the case law was mostly consistent with the statute despite not appearing to utilize it.¹⁵⁶

*Bohannon v. Allstate Insurance Co.*¹⁵⁷ changed Oklahoma's choice-of-law landscape significantly. The Oklahoma Supreme Court answered a certified question from the United States Court of Appeals for the Tenth Circuit.¹⁵⁸ The precise issue was whether a California automobile insurance contract that allowed the insurer to subtract from its UM liability the amount received by the insured from third-party tortfeasors was governed by the law of California or Oklahoma when Oklahoma was the place enforcement was sought and had a statute which expressly provided that UM coverage was not to be subrogated by recovery of other UM money.¹⁵⁹ The court held that the California contract must be consistent with the public policy of Oklahoma and, therefore, the subrogation provision was unenforceable to the extent that it allowed the insurer a set-off against UM coverage that was purchased pursuant to an Oklahoma policy.¹⁶⁰

151. *See id.* at 1419.

152. *See id.* at 1419-20.

153. *See id.* at 1420.

154. *Id.* at 1419-20 (relying on *Kemp v. Allstate Ins. Co.*, 601 P.2d 20 (Mont. 1979), which interpreted an identical statute and concluded that the insurance company had contemplated performance in any state).

155. *See id.* at 1418, 1420.

156. *See id.* at 1420 n.5 ("While many Oklahoma cases do not appear to rest directly on the statute, the majority follow the rule it embodies.").

157. 1991 OK 64, 820 P.2d 787.

158. *See id.* ¶ 6, 820 P.2d at 790.

159. *See id.* ¶¶ 7, 12, 820 P.2d at 790-92 (citing 36 OKLA. STAT. § 3636 (1981)).

160. *See id.* ¶ 31, 820 P.2d at 797. *But see* *Burgess v. State Farm Mut. Auto. Ins. Co.*, 2003 OK CIV APP 85, ¶ 13, 77 P.3d 612, 614 (holding that the anti-stacking provision of two Kansas

Based on earlier Oklahoma decisions providing for a public policy exception to the general rule,¹⁶¹ this outcome is not surprising. However, the significance of the decision stems from the rule articulated by the court:

The validity, interpretation, application and effect of the provisions of a motor vehicle insurance contract should be determined in accordance with the laws of the state in which the contract was made, unless those provisions are contrary to the public policy of Oklahoma, *or unless the facts demonstrate that another jurisdiction has the most significant relationship with the subject matter and the parties.*¹⁶²

The court cited *Telex Corp. v. Hamilton* and *Clark v. First National Bank* for the general rule¹⁶³ and acknowledged title 15, section 162 of the Oklahoma Statutes as “the statutory source of the *lex loci contractus* and the *lex loci solutionis* rules [that] remain a part of our law in ordinary contract cases.”¹⁶⁴ However, the court noted that motor vehicle insurance contracts are “in a class by themselves” and concluded that the established rule does not allow for sufficient consideration to be given to the statutes and public policies of the several states.¹⁶⁵ Therefore, the court concluded, the *Restatement (Second) of Conflict of Laws*’ “most significant relationship” test should be available.¹⁶⁶

It is interesting that the court expanded its choice-of-law rule in *Bohannan* when it seems to have been able to reach the same result without incorporating

policies could not violate Oklahoma public policy because there was no Oklahoma policy implicated); *Herren v. Farm Bureau Mut. Ins. Co.*, 2001 OK CIV APP 82, ¶ 17, 26 P.3d 120, 123 (holding that *Bohannan* did not invalidate provisions in an insurance policy that subrogated UM coverage; there was no Oklahoma policy involved). These two court of appeals cases demonstrate that Oklahoma courts will not allow a plaintiff covered only by foreign insurance policies to use Oklahoma’s public policy to get more than they have contracted for. Rather, the *Bohannan* decision was meant to protect injured plaintiffs who were covered by an Oklahoma policy from having coverage that they contracted for under Oklahoma law subrogated by a foreign insurance contract.

161. *See* *Dean Witter Reynolds, Inc. v. Shear*, 1990 OK 67, ¶ 6, 796 P.2d 296, 299; *Legg v. Midland Savs. & Loan Co.*, 1916 OK 46, ¶ 3, 154 P. 682, 684 (per curiam); *Pate v. MFA Mut. Ins.*, 1982 OK CIV APP 36, ¶ 11, 649 P.2d 808, 811.

162. *Bohannan*, ¶ 30, 820 P.2d at 797 (emphasis added).

163. *See id.* ¶ 17, 820 P.2d at 793.

164. *See id.* ¶ 24, 820 P.2d at 795.

165. *See id.* ¶ 25, 820 P.2d at 795.

166. *See id.* ¶ 30, 820 P.2d at 797; *see also id.* ¶ 27 n.5, 820 P.2d at 796 n.5 (“[T]he most significant relationship test should be available where the facts demonstrate that the *lex loci contractus* rule is insufficient to protect the fundamental law of the forum and the rights of the parties.”).

the “most significant relationship” test.¹⁶⁷ None of the court’s analysis on whether the California insurance policy was consistent with Oklahoma’s public policy relied upon a determination of the state with the “most significant relationship.”¹⁶⁸ Rather, the *Restatement (Second)* was used as persuasive authority for when the public policy exception can be invoked.¹⁶⁹ Also significant is the broad language used by the court when stating that “most significant relationship” test should be made available.¹⁷⁰ While it has so far been clear that the *Bohannan* rule does not extend beyond the bounds of motor vehicle insurance policies,¹⁷¹ the same rationale could hold in other scenarios involving competing state interests.

In addition, while the *Bohannan* court references title 15, section 162 of the Oklahoma Statutes, it does not conduct any discussion on where the insurance contract is to be performed.¹⁷² However, what seems to result from *Pate* and *Rhody* is that Oklahoma courts seem unwilling to recognize that an automobile insurance contract can indicate a place of performance absent a specific designation of such a place in the contract.¹⁷³ Whether this construction applies to all contractual choice-of-law determinations under section 162 remains an open question.¹⁷⁴

167. Cf. *id.* ¶¶ 17, 19-21, 820 P.2d at 793-94 (citing *Pate v. MFA Mut. Ins. Co.*, 1982 OK CIV APP 36, 649 P.2d 809, with approval when applying the public policy exception to the *lex loci contractus* rule).

168. See *id.* ¶¶ 26-31, 820 P.2d at 795-97.

169. See *id.* ¶¶ 26-30, 820 P.2d at 795-97; see also *Pate*, ¶¶ 12-14, 649 P.2d at 811-12 (using the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) to determine when the public policy exception can be invoked but not inquiring into which state has the most significant relationship to the issues at bar).

170. See *id.* ¶ 27 n.5, 820 P.2d at 796 n.5.

171. See *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 14, 164 P.3d 1028, 1034.

172. See *Bohannan*, ¶¶ 17-31, 820 P.2d at 793-97.

173. See also *Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416, 1420 (10th Cir. 1985) (“Because no place of performance is indicated, the law of the place where the policy was made must govern”); *Burgess v. State Farm Mut. Auto. Ins. Co.*, 2003 OK CIV APP 85, ¶ 19, 77 P.3d 612, 615 (“In the absence of evidence establishing the Kansas policies provided for a place of performance, we interpret the contracts according to the law and usage of the place where they were made”). The Tenth Circuit and Oklahoma Court of Appeals cases seem more analytically sound than the Oklahoma Supreme Court’s rationale in *Bohannan* because those courts look first for a place of performance and only look at the place where the contract was made if none is found. See, e.g., *id.* This is more obedient to the plain text of title 15, section 162 of the Oklahoma Statutes and the court’s earlier pronouncement in *Panama Processes v. Cities Service Co.*. See generally 1990 OK 66, 796 P.2d 276; 15 OKLA. STAT. § 162 (2001).

174. See *infra* Part IID for more discussion on this and other issues unresolved by Oklahoma choice-of-law cases.

5. Harvell v. Goodyear: *Limiting Bohannon*

Fifteen years after deciding *Bohannon*, the Oklahoma Supreme Court confirmed that its holding in *Bohannon* would not extend outside the context of motor vehicle insurance contracts.¹⁷⁵ In *Harvell v. Goodyear Tire & Rubber Co.*, the court overturned a trial court's certification of a class action lawsuit brought by consumers from approximately thirty-seven states who had their vehicles serviced by Goodyear since 1998.¹⁷⁶ The determination turned in large part on whether Oklahoma would apply more than one state's substantive law to the service contracts.¹⁷⁷ The court held that because Oklahoma's *lex loci contractus* rule would require the trial court to apply the law of each state where service was performed, the class would be unmanageable.¹⁷⁸

The court began its choice-of-law analysis by rejecting the trial court's conclusion that the "most significant relationship" test applied.¹⁷⁹ The court acknowledged that the *Restatement (Second)*'s test had been approved for application in the context of motor vehicle insurance contracts and contracts for the sale of goods under the U.C.C; however, it stated that neither of those exceptions were involved in a dispute over automobile service agreements.¹⁸⁰ Although the court stated that the rule from *Telex Corp. v. Hamilton* and *Clark v. First National Bank* (providing that the place of making governs a contract) was the general rule,¹⁸¹ it started its analysis with a determination of the place of performance of each of the contracts.¹⁸² The court then analyzed the agreements by the text of title 15, section 162 of the Oklahoma Statutes and found that because each service agreement was to be performed at the place where the service was rendered, the law of each of those places would govern the service agreements, thus making the class unmanageable.¹⁸³

B. Reconciling Two Apparent Lines of Cases

As previously shown, many Oklahoma decisions do not rest directly on the statutory directive found in title 15, section 162 of the Oklahoma Statutes.¹⁸⁴

175. See *Harvell*, ¶ 14, 164 P.3d at 1033-34.

176. See *id.* ¶¶ 1, 5, 164 P.3d at 1030-31.

177. See *id.* ¶ 13, 164 P.3d at 1033.

178. See *id.* ¶¶ 15-16, 164 P.3d at 1034-35.

179. See *id.* ¶ 14, 164 P.3d at 1033-34.

180. See *id.*

181. See *id.* ("[T]he established choice of law rule in contract actions known as *lex loci contractus* is that, unless the contract terms provide otherwise, the nature, validity, and interpretation of a contract are governed by the law where the contract was made.").

182. See *id.* ¶ 15, 164 P.3d at 1034.

183. See *id.*

184. See also *Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416, 1420 n.5 (10th Cir. 1985).

In fact, although that statute has been on the books since 1890,¹⁸⁵ the first case to decide a choice-of-law issue with reference to the statute was the 1939 opinion in *Monahan v. New York Life Insurance Co.*¹⁸⁶ Some courts have characterized the statute as an embodiment of the *lex loci contractus* rule¹⁸⁷ while others have stated that it is a departure from that general rule.¹⁸⁸

Two lines of cases reflecting different rules seem to have developed for resolving contractual choice-of-law issues; these have been referred to as the “place of making” and “place of performance” rules.¹⁸⁹ The place of making rule is the most frequently cited and has its origins in *Atchison, T. & S. F. Railway Co. v. Smith*,¹⁹⁰ although *Telex Corp. v. Hamilton*¹⁹¹ and *Clark v. First National Bank*¹⁹² are the cases most cited for this proposition. The place of performance rule was established in Oklahoma jurisprudence by *Richardson v. Shelby*¹⁹³ but is most often cited by courts as being represented by *Legg v. Midland Savings & Loan Co.*,¹⁹⁴ *Collins v. Holland*,¹⁹⁵ and *Monahan v. New York Life Insurance Co.*¹⁹⁶

At first glance, these two rules seem to be at odds with one another; and each by itself seems contrary to the plain text of title 15, section 162 of the Oklahoma Statutes. In application, however, there is little conflict between the two rules and the statute. When properly applied, the distinction between the rules distills down to rhetoric. However, misunderstanding the nature of the rules has led to confusion.¹⁹⁷ The bottom line is that under Oklahoma law, if

185. See STAT. § 864 (1890).

186. See 26 F. Supp. 859, 862 (W.D. Okla. 1939).

187. Recall that the term “*lex loci contractus*” can refer to either the place of making or the place of performance. BLACK’S LAW DICTIONARY 995 (9th ed. 2009).

188. Compare *Rhody*, 771 F.2d at 1420 n.5 (“While many Oklahoma cases do not appear to rest directly on the statute, the majority follow the rule it embodies.”), and *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 24, 820 P.2d 787, 795 (stating the title 15, section 162 of the Oklahoma Statutes is the statutory source for the *lex loci contractus* and *lex loci solutionis* rules), with *Monahan*, 26 F. Supp. at 862 (finding the statute to be contrary to the “established principles of common law and usage”), and *Panama Processes v. Cities Serv. Co.*, 1990 OK 66, ¶ 26, 796 P.2d 276, 287 (“Section 162 is not a declaration of the rule of *lex loci contractus* . . .”).

189. See Webster, *supra* note 9, at 385.

190. See 1913 OK 162, ¶ 8, 132 P. 494, 496.

191. See 1978 OK 32, ¶ 8, 576 P.2d 767, 768.

192. See 1916 OK 404, ¶ 9, 157 P. 96, 98 (per curiam).

193. See 1895 OK 48, ¶ 17, 41 P. 378, 380.

194. See 1916 OK 46, ¶ 3, 154 P. 682, 684 (per curiam).

195. See 1934 OK 404, ¶ 15, 34 P.2d 587, 588 (per curiam).

196. See 26 F. Supp. 859, 861 (W.D. Okla. 1939).

197. See, e.g., *Sec. Trust & Savs. Bank v. Gleichmann*, 150 P. 908, 910 (1915) (per curiam) (reversing the trial court’s determination that Oklahoma law should apply if the bank notes were executed in Oklahoma regardless of their place of performance).

the parties to a contract enter into the agreement in State X, but contemplate performance of the contract to occur in State Y, the contract will be governed by the law of State Y no matter which of the aforementioned rules is applied.¹⁹⁸

The easiest rule to apply analytically is the plain text of title 15, section 162 of the Oklahoma Statutes, which provides that a contract is governed by the law of the place of performance if one is indicated, and by the law of the place of its making if there is no indication.¹⁹⁹ In the above hypothetical, State Y's law will govern the contract because it is to be performed in that state. Obviously the same analysis and result occur if you apply the rule from *Richardson* or *Collins* that the law of the place of performance governs a contract.²⁰⁰

The place of making rule will also produce the same result when applied correctly. The place of making rule requires contracts to be governed by the law of the place of making *unless the parties indicate a mutual intention to the contrary*.²⁰¹ Another well-established common law rule presumes that when a contract is made in one place but is to be performed in another, the parties *intended* that the laws of the place of performance govern the contract.²⁰² Therefore, applying both common law rules to the aforementioned hypothetical, the presumed intention of the parties is given effect and the law of the place of performance governs instead of the law of the place of making.²⁰³

Although the court opinions seem to interchange the rules, the majority of them can be reconciled if the proper operation of the discussed rules is kept in mind. If, at the time of contract execution, the parties indicated a place of performance different from the place of making, the Oklahoma Supreme Court has never applied the place of making rule from *Clark* to the exclusion of the place of performance rule. While it is more analytically satisfying to apply the

198. When the place of making and the place of performance are the same, then there is no discrepancy in outcome between the two rules.

199. See 15 OKLA. STAT. § 162 (2001).

200. See *Collins*, 1934 OK 404, ¶ 15, 34 P.2d at 588; *Richardson v. Shelby*, 1895 OK 48, ¶ 17, 41 P. 378, 380. The deficiency in the "common law" rule that the place of performance should govern a contract is that some contracts do not contemplate a place of performance when they are made. See *Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416, 1420 (10th Cir. 1985) (finding no indication from the contract or circumstance that the parties indicated where the automobile insurance contract was to be performed).

201. See *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 14, 164 P.3d 1028, 1033-34; *Atchison, T. & S. F. Ry. Co. v. Smith*, 1913 OK 162, ¶ 7, 132 P. 494, 496.

202. See *Gleichmann*, 150 P. at 911.

203. See James Audley McLaughlin, *Conflict of Laws: The Choice of Law Lex Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957, 969 (1991).

text of the statute and conduct the analysis in that order, the variance found in the case law is without any substantive significance, and application of the rule to a simple contractual choice-of-law dispute should prove straightforward.

C. Oklahoma Cases Addressing Contracts with Multiple Places of Performance

The primary purpose of this comment is to develop a standard for the more complex contractual choice-of-law disputes — those that arise when a contract contemplates at least two distinct places of performance. Oklahoma lacks case law to direct us in determining which place of performance should govern. However, the court has not left us completely without guidance; there are exactly two cases decided by the Oklahoma Supreme Court that distinguish between multiple places of performance. Unfortunately, the court did not utilize any cognizable standard for selecting one place over another in either case. Nevertheless, the language and analysis used by the court in these two cases suggests that “the place of performance” in section 162 should be understood as the *principal* place of performance.²⁰⁴

In *Atchison, T. & S. F. Railway Co. v. Smith*, the Oklahoma Supreme Court indicated that when the parties to a contract contemplate more than one place of performance, the law of the *principal* place of performance should govern the agreement.²⁰⁵ As discussed *supra* in Part IIA1, the court applied Oklahoma law to a contract entered into in Kansas which disclaimed liability for any accidental injury that occurred on a train passage.²⁰⁶ The court concluded that Oklahoma was the place where the contract was to be “principally performed” because a much greater part of the journey was to occur in Oklahoma.²⁰⁷ The

204. See *Atchison*, 1913 OK 162, ¶ 8, 132 P. at 496 (holding that a contract was to be governed by the law of Oklahoma where it was to be “principally performed”); 15 OKLA. STAT. § 162; see also *Panama Processes v. Cities Serv. Co.*, 1990 OK 66, ¶ 27, 796 P.2d 276, 288 (“Under these circumstances, it is clear that the contract was to be performed in major part in Brazil.”); Webster, *supra* note 9, at 388 (stating that *Atchison* defined “place of performance” as meaning the “principal place of performance”).

205. See *Atchison*, ¶ 8, 132 P. at 496. The fact that the parties, at the time the contract was made, actually contemplated that performance would occur in two different states is significant. If the parties were to only reference one state of performance when making the contract, but later performance actually occurred in multiple places, then it would be an error for a court to “read into the contract” multiple places of performance. Similarly, if the parties do not know where the contract will be performed at the time the contract is made, the courts are not going to decide after the fact that the contract *indicated* a place of performance, and will instead apply the law of the place where the contract was made.

206. See *id.* ¶¶ 2, 16, 132 P. at 495, 497.

207. *Id.* ¶ 8, 132 P. at 496. About 100 miles of the journey was to occur in Oklahoma while only “a short distance” was to be traversed in Kansas. See *id.* ¶ 2, 132 P. at 495.

analysis and conclusion here are obvious and do very little to assist in determining where the principal place of performance would be in a more complex factual scenario.

In *Panama Processes v. Cities Service Co.*, discussed *supra* in part IIA3, the court was faced with a more difficult determination regarding whether a letter of agreement between a minority shareholder and the majority shareholder of a Brazilian corporation would be governed by the laws of Brazil or New York.²⁰⁸ The letter agreement provided assurances to the minority shareholder that the Brazilian corporation would not cease paying dividends or continue to expand unless other conditions were first satisfied.²⁰⁹ The agreement was negotiated and signed in New York at the majority shareholder's principal place of business.²¹⁰

The court held that "the contract was to be performed *in major part* in Brazil."²¹¹ In reaching this decision, the majority engaged in a balancing test where it identified the elements of performance which occurred in New York and compared those with the performance that occurred in Brazil.²¹² However, this analysis is almost as brief and one-sided as that in which the court engaged in *Atchison*.²¹³ The court recognized that some performance had to occur in New York because the agreement required the majority shareholder to make decisions consistent with the agreement — decisions which would be made at its principal place of business in New York.²¹⁴

However, the majority found this activity to be slight when compared with the performance which occurred in Brazil.²¹⁵ The court pointed out that any decision made by the majority shareholder in New York would have to be subsequently implemented by the corporate officers in Brazil.²¹⁶ Furthermore, and perhaps more importantly, the agreement explicitly provided that any

208. See 1990 OK 66, ¶¶ 1-2, 796 P.2d 276, 278-79. The letter agreement was actually executed prior to the defendant (Cities) becoming the majority shareholder. See *id.* ¶ 2, 796 P.2d at 278-79. Cities became the majority shareholder of the Brazilian company when the corporation bought back the stock from a third shareholder. See *id.* Before the plaintiff (Panama) would allow that transaction to occur it wanted the assurances contained in the letter agreement at issue. See *id.*

209. See *id.* ¶ 2 n.2, 796 P.2d at 279 n.2.

210. See *id.* ¶ 27, 796 P.2d at 288.

211. *Id.* (emphasis added).

212. See *id.* ¶¶ 28-30, 796 P.2d at 288.

213. See generally *id.*; *Atchison T. & S. F. Ry. Co. v. Smith*, 1913 OK 162, ¶ 10, 132 P. 494, 496.

214. See *Panama Processes*, ¶ 27, 796 P.2d at 287-88; see also *id.* ¶ 2 n.2, 796 P.2d at 279 n.2 (quoting the agreement which provided that the majority shareholder would not cause the Brazilian corporation to stop paying dividends or expand further).

215. See *id.* ¶¶ 29-30, 796 P.2d at 288.

216. See *id.* ¶ 27, 796 P.2d at 288.

future corporate policy was subject to “the industrial, fiscal, and political situation in Brazil.”²¹⁷ And finally, the agreement centered on the corporate policy of a Brazilian corporation.²¹⁸

Considering only these factors, the determination that Brazilian law would govern the contract seems almost obvious from the outset. Remember that the purpose of contractual interpretation, including choice-of-law determinations, is to give effect to the intent of the parties at the time of contracting. The place of performance rule was established in light of this principle.²¹⁹ When one examines the agreement through this lens, it is logical that Brazilian law should govern. The subject matter of the contract was the corporate policy of a Brazilian company and the contract made specific reference to the law and financial climate of Brazil. Whether you look for the place of performance or just to see whether the parties had selected a law to govern the contract, Brazil is the obvious conclusion.

Atchison and *Panama Processes* both suggest that when a contract contemplates two places of performance, the place where the larger part of that performance is rendered — or the principal place of performance — should govern.²²⁰ However, neither decision defines how this determination should be made in cases involving two jurisdictions where relatively equal levels of performance will be rendered.²²¹ Additionally, as the Oklahoma Supreme Court has not explicitly addressed this issue, the question of whether determining the principal place of performance is actually what is required by section 162 remains open. These questions will be discussed in depth in Part IV of this comment.

D. Other Issues Left Unresolved by Oklahoma Case Law

The primary focus of this comment is on the phrase “place of performance” in title 15, section 162 of the Oklahoma Statutes.²²² However, Oklahoma’s choice-of-law jurisprudence has left two other gaps in the construction of section 162. First, no Oklahoma court has defined what is meant by the word “indicate.” Second, the term “interpretation” has never been defined, although the cases and commentary seem to presume that section 162 applies to all

217. *See id.* ¶ 2 n.2, 796 P.2d at 279 n.2.

218. *See id.* ¶ 27, 796 P.2d at 288.

219. *See* Sec. Trust & Savs. Bank v. Gleichmann, 150 P. 908, 911 (Okla. 1915) (per curiam); *see also* Webster, *supra* note 9, at 385 (stating that the “place of making” and “place of performance” rules are “significant factors in determining the intent of the parties”).

220. *See Panama Processes*, ¶¶ 27-30, 796 P.2d at 287-88; *Atchison T & S. F. Ry. Co. v. Smith*, 1913 OK 162, ¶ 8, 132 P. 494, 496.

221. *See Panama Processes*, ¶¶ 27-30, 796 P.2d at 287-88; *Atchison*, ¶ 8, 132 P. at 496.

222. *See* 15 OKLA. STAT. § 162 (2001).

contractual choice-of-law resolutions. These questions are merely presented in this comment so that the issues are identified, but no resolution of the matters is sought.

A possible construction of section 162, and one that may be tacitly utilized in the context of motor vehicle insurance contracts,²²³ is to narrowly construe the word “indicate” in section 162 to mean to “specify” a place of performance. This essentially creates a pass-through to the second clause of the statute and defaults to the place of making rule *unless* the parties expressly state a place of performance in the terms of their agreement.²²⁴ This interpretation of section 162 would reduce the need for deciding which place of performance trumps; however, it would not eliminate the need entirely. The parties could specify in their contract that different obligations are to be performed in different places yet still not include a choice-of-law provision in the agreement.²²⁵ In such a situation, the court would still have to decide whether to select one of the specified places of performance to govern the whole agreement or whether each obligation should be governed by the law of the place where that obligation is to be performed.

Another plausible construction of section 162 is to narrowly construe its application to only apply to the interpretation of ambiguous contractual terms by taking the term “interpretation” literally. This would offer the court more flexibility in applying either the *lex loci contractus* rules or adopting a more modern choice-of-law approach without completely ignoring the text of section 162. However, this is not consistent with prior case law and seems unlikely to be adopted. Additionally, of the four states who utilize this statute, only California has adopted this narrow application.²²⁶ Even then, it was done in an attempt to reconcile the state’s modern jurisprudence with an old, seemingly ignored statute.²²⁷ The remaining three states have understood the statute to apply to all contractual choice-of-law determinations, and commentators have agreed.²²⁸

223. See, e.g., *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 30, 820 P.2d 787, 797 (holding that the place of making rule applies to motor vehicle insurance contracts without first inquiring whether the contract indicates a place of performance); see also *Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416, 1420 (10th Cir. 1985) (requiring a specific designation of a place of performance in order to the place of performance rule to supplant the place of making rule).

224. See 15 OKLA. STAT. § 162 (“A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not [specify] a place of performance, according to the law and usage of the place where it is made.”).

225. See, e.g., discussion *infra* Part IVA (providing an illustrative hypothetical).

226. See *Frontier Oil Corp. v. RLI Ins. Co.*, 63 Cal. Rptr. 3d 816, 835 (Cal. Ct. App. 2007).

227. See *id.*; see also discussion *infra* Part III on California’s contractual choice-of-law rules.

228. See *infra* Part III for discussion on Montana and South Dakota choice-of-law rules; see also Webster, *supra* note 9, at 385.

The rest of this comment assumes the term “interpretation” in section 162 does not limit the statute from applying to all contractual choice-of-law questions because Oklahoma case law makes no attempt to treat it differently. No assumption of the term “indicate” is required because regardless of what construction the term is given, some method to assist in choice-of-law determinations when a contract contemplates multijurisdictional places of performance is still necessary.

III. Jurisdictions with Statutes Identical to Section 162

Oklahoma’s contractual choice-of-law statute is not unique in the United States; three other states currently have statutes identical to title 15, section 162 of the Oklahoma Statutes — California, Montana, and South Dakota.²²⁹ A brief analysis of how these jurisdictions interpret and apply their statutory directive compared with the jurisprudence that has developed in Oklahoma helps to identify some of the options available to Oklahoma courts when applying section 162. It is worth noting at the outset that none of these states are considered among those that still apply the traditional *lex loci contractus* rule when determining which law governs a contract.²³⁰ Additionally, none of the four states with the statute apply it in exactly the same way, although some similarities exist.

While California still has the statute on the books, the courts have relegated it to the very narrow function of only applying to choice-of-law matters concerning the *interpretation* of contract terms.²³¹ The state applies a “governmental interest” test to determine what law governs a contract for anything that does not involve the interpretation of the contract.²³² Despite this limited role, any California decision determining that one place of performance was to be applied over another would be insightful. Unfortunately, no California case seems to have addressed this issue directly.

Of the three jurisdictions discussed in this section, California’s choice-of-law jurisprudence is the most dissimilar to that of Oklahoma. Oklahoma interprets title 15, section 162 of the Oklahoma Statutes as controlling all aspects of contract choice-of-law determinations that do not fall within the purview of the U.C.C. or *Bohannon* exceptions. On the contrary, California makes a distinction between matters bearing on interpretation and “other

229. See CAL. CIV. CODE § 1646 (West 1985); MONT. CODE ANN. § 28-3-102 (2009); S.D. CODIFIED LAWS § 53-1-4 (2004).

230. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 942-44 (2004).

231. See *Frontier Oil Corp.*, 63 Cal. Rptr. 3d at 835.

232. See *id.* at 835-36.

choice-of-law issues.”²³³ Presumably, this narrow interpretation is made in order to apply a more modern choice-of-law analysis to most choice-of-law issues without judicially abrogating the statutory directive.²³⁴ The Oklahoma Supreme Court could make a similar interpretation; however, so far the court has made clear that it will not.²³⁵

In Montana, the statutory directive is still given effect despite the Montana Supreme Court’s adoption of the *Restatement (Second) of Conflict of Laws*’ “most significant relationship” test.²³⁶ Relying on section 6(1) of the *Restatement (Second)*, the Montana courts are to apply the “most significant relationship” factors only when the text of section 28-3-102²³⁷ does not apply.²³⁸ Therefore, the Montana courts only apply the Restatement (Second) factors to determine whether a choice-of-law clause in a contract is enforceable.²³⁹ However, this analysis becomes circular because the *Restatement (Second)* section 187 provides that the parties’ choice-of-law provision will only be invalidated in favor of another place’s law if, *inter alia*, that other place’s law would apply absent a choice-of-law clause.²⁴⁰ And, absent a choice-of-law clause, Montana looks to section 28-3-102.²⁴¹ Therefore, Montana’s choice-of-law statute is implicated in either scenario.

The operation of Montana’s choice-of-law statute necessitates that when determining which law governs a contract that does not have a choice-of-law provision, the first step is to determine whether the contract indicates a place of performance.²⁴² Despite the rhetorical differences from Oklahoma’s application of section 162, this inquiry is exactly the same. Unfortunately, the Montana courts have not addressed the need for determining a contract’s principal place of performance or otherwise articulated a standard for determining which place of performance should control.

233. *See id.* at 835.

234. *See id.* at 830 (stating that California’s modern governmental interest analysis does not judicially abrogate the statutory directive of California’s section 162 analogue).

235. *See Bohannon v. Allstate Ins. Co.*, 1991 OK 64, ¶ 30, 820 P.2d 787, 797 (“[W]e must remain aligned with those states that continue to follow the *lex loci contractus* rule.”).

236. *See Polzin v. Appleway Equip. Leasing Inc.*, 2008 MT 300, ¶¶ 16-18, 345 Mont. 508, 191 P.3d 476.

237. The text of Montana’s statute is nearly identical to Oklahoma’s title 15, section 162, and reads: “A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.” MONT. CODE ANN. § 28-3-102.

238. *See Polzin*, ¶¶ 16-18; *Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, ¶ 40, 341 Mont. 467, 178 P.3d 102.

239. *See, e.g., Polzin*, ¶ 14.

240. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

241. *See Polzin*, ¶ 18.

242. *See* MONT. CODE ANN. § 28-3-102; *Wamsley*, ¶ 40.

South Dakota also appears to apply the *Restatement (Second)* in order to determine whether a contractual choice-of-law provision is valid,²⁴³ but still gives effect to its statutory directive in other contexts.²⁴⁴ Applying South Dakota law, the United States Bankruptcy Court for the District of South Dakota found that when a contract indicates multiple places of performance, the law of the “predominant” place of performance should govern the contract.²⁴⁵ In the case of *In re Worden*, the court found Wyoming to be the “predominant” place of performance because the contract restricted the defendant from practicing as an accountant in three cities in Wyoming but only one in South Dakota.²⁴⁶ This conclusion is as obvious as the Oklahoma Supreme Court’s decision in *Atchison, T. & S. F. Railway Co. v. Smith*²⁴⁷ and does little to define a standard for making such determinations, other than to suggest that the place where the most performance is to occur is the place of performance that should count.²⁴⁸

Both Montana and South Dakota’s contractual choice-of-law rules are fairly closely aligned with Oklahoma’s *general* contractual choice-of-law rule under title 15, section 162 of the Oklahoma Statutes. Although rhetorical differences exist, and both Montana and South Dakota more openly embraces the *Restatement (Second)*’s “most significant relationship” test, all three states apply the place of performance rule when such a place is indicated by the contract.

IV. Defining the Place of Performance

The Oklahoma Supreme Court has *suggested* that title 15, section 162 of the Oklahoma Statutes should be understood as meaning the law of the *principal* place of performance governs the interpretation of a contract, but the court has yet to address this issue directly.²⁴⁹ This interpretation of section 162 is not its only plausible construction. The term “principal place of performance” implies that there can be only one place of performance to govern the entire contract; that is, that each issue in the contract is governed by the law of the same state. However, modern choice-of-law theories endorse the application

243. See *Dunes Hospitality, L.L.C. v. Country Kitchen Int’l, Inc.*, 2001 SD 36, ¶ 11, 623 N.W.2d 484, 488.

244. See *Union Pac. R.R. v. Certain Underwriters at Lloyd’s London*, 2009 SD 70, ¶ 22, 771 N.W. 2d 611, 618.

245. See *In re Worden*, 63 B.R. 721, 723 (Bankr. D. S.D. 1986).

246. See *id.*

247. 1913 OK 162, 132 P. 494.

248. See *In re Worden*, 63 B.R. at 723.

249. See *supra* Part IIC for discussion on *Atchison*, 1913 OK 162, 132 P. 494, and *Panama Processes v. Cities Service Co.*, 1990 OK 66, 796 P.2d 276.

of laws from different places to different contract issues when those places have “the most significant relationship” to a particular issue.²⁵⁰ A similar approach could be utilized under the text of section 162, whereby contracts with multiple promises or obligations could be governed by the law of different places if each promise or obligation has a distinct place of performance.²⁵¹

Thus, the fundamental dichotomy is presented regarding the correct interpretation of “the place of performance” under section 162. Should section 162 be read as requiring that a contract be governed by the law of a single, “principal” place of performance? Or should each obligation arising under an agreement be subject to the law of the place where that obligation is to be performed?

A. An Illustrative Hypothetical

Before proceeding further, it is prudent to provide a hypothetical contract that illustrates the concerns and objectives of our inquiry. Suppose that an oil well operator hires a contractor to drill seven oil wells. Four wells are to be drilled in State Y and three in State Z. The operator’s nerve center is located in State X while the drilling contractor is headquartered in State Y. Assume the drilling contract is a form contract where minimal negotiation occurs via email and the contract is executed by the operator’s signature at its headquarters in State X.

Now suppose that after drilling operations have commenced on the wells the operator believes there has been a material breach of the drilling contract as it pertains certain wells. Assume State X’s law would invalidate a provision in the agreement and result in a determination of no breach while the other two states’ laws would uphold the provision. If the operator files suit in State Z against the drilling contractor for breach of contract, and State Z uses Oklahoma’s choice-of-law rules, which state’s law should govern the contract? Does it matter which state the wells in question are located in? What if the alleged breach pertains to wells located in more than one state?

This hypothetical identifies two questions left unresolved by Oklahoma case law. First, when a contract is to be performed approximately equally in multiple places, which place should be considered the “principal” place of

250. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971) (“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.”) (emphasis added); *see also id.* § 188 cmt. b (noting that the protection of justified expectations can vary on an issue-by-issue basis).

251. *See* Nancy Yuenger, *Law of the Place of Performance*, 12 CAL. JUR. 3D CONFLICT OF LAWS § 69 (2009) (citing *Hayter v. Fulmor*, 152 P.2d 746 (Cal. Dist. Ct. App. 1944)).

performance? Second, should one state's law govern an entire contractual agreement or should each obligation arising under a contract be analyzed separately? In other words, is inquiry into the "principal" place of performance even necessary?

If a contract is to only be governed by one state's law, then the court will have to determine which place of performance was most essential to the contract as a whole and apply that state's law to the entire agreement. On the contrary, if the obligations are to be bifurcated and subject to the law of the place where each is to be performed, then the place of performance is determined on an obligation-by-obligation basis. In the above hypothetical, this could mean that there are potentially two different places of performance and a court would have to apply the laws of multiple states to a single suit. Therefore, the question of whether a contract should be governed by the law of only one place, or whether separate obligations arising under a contract should be governed by the law of separate places, is the threshold question. If the former is the desired result, then a standard for determining the "principal place of performance" must also be established.

B. The Principal Place of Performance Test

1. Rationale Supporting the Application of a Single Place's Law

It is important to note at the outset that no Oklahoma Supreme Court decision has applied the law of two separate places to a single contractual dispute. However, this may be because the specific issue has never come before the court. There is some support for both approaches — applying one law to govern the whole contract or applying the laws of different places to different parts of the contract — in Oklahoma's case law; however, there seems to be more *Oklahoma* authority to support the proposition that only one law should govern a given agreement.

In *Clark v. First National Bank*, the Oklahoma Supreme Court stated that the execution, interpretation, and validity of a contract are to be governed by the law of the place of making, matters relating to performance should be controlled by the law of the place of performance, and, matters regarding the remedy by the law of the forum.²⁵² Here, the language indicates that the law of one place could determine whether a contract was validly entered into while the law of another place would govern whether a material breach has occurred.²⁵³ Despite this articulation of the rule, however, the holding in *Clark*

252. 1916 OK 404, ¶ 9, 157 P. 96, 98 (per curiam).

253. See Weintraub, *supra* note 1, § 3.4, at 96 (noting that the rule from the first RESTATEMENT OF CONFLICT OF LAWS (1934) allows for the validity of a contract to be determined by the law of the place of contracting while the sufficiency of performance is

did not require the application of more than one state's law to the issue before it — whether a chattel mortgage was properly enforced in Kansas.²⁵⁴

Furthermore, Oklahoma case law has moved away from the rule distinguishing validity, interpretation, and execution from performance.²⁵⁵ Later cases seek to find one law to govern the agreement and will apply that law to both questions of validity and performance.²⁵⁶

To determine whether Oklahoma's choice-of-law rules should apply one law or multiple laws to a given contractual dispute, the text of section 162 is the natural starting point: "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."²⁵⁷ Necessary to our determination is the definition of the term "contract." Fortunately, the legislature has provided a definition: "A contract is an agreement to do or not to do a certain thing."²⁵⁸ In contracts for the sale of goods, the legislature further distinguishes the meaning of the word "contract" from that of "agreement" and defines a contract as "the total legal obligation that results from the parties' agreement."²⁵⁹ "Agreement" is defined as the "bargain of the parties in fact."²⁶⁰ Therefore, the contract is the sum total of agreements and the legal obligations that flow from them. Applying this reasoning to section 162, it follows that the text of the statute does not contemplate more than one law governing a contract, regardless of how many different places the obligations are to be performed.

Additionally, this result may promote judicial efficiency. While requiring judges to weigh all places of performance against each other and select one to govern the contract is initially more difficult than the alternative, in the long run it may be more efficient. If after the initial determination the judge were required to apply the law of State X to one matter but the law of State Y to

determined by the place of performance and that these places could be distinct from each other).

254. *See id.* § 3.4, at 99.

255. *See Webster, supra* note 9, at 388 (stating that most cases have done away with this distinction and that it was probably meaningless in the first place); *see also* McLaughlin, *supra* note 203, at 970 (recognizing that "it is difficult to distinguish between 'the nature and extent of the duty to perform' and the 'sufficiency of performance'") (internal citations omitted).

256. *See, e.g., Panama Processes v. Cities Serv. Co.*, 1990 OK 66, ¶ 27, 796 P.2d 276, 287-88 (applying the law of the place of performance, which was distinct from the place of making, to determine the validity of the contract). Despite this, however, the courts still state the rule as applying the place of making to matters bearing on "nature, validity, and interpretation." *See, e.g., Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 14, 164 P.3d 1028, 1033-34.

257. 15 OKLA. STAT. § 162 (2001).

258. 15 OKLA. STAT. § 1 (2001). *See also* (referencing 12A OKLA. STAT. § 1-201(12)).

259. 12A OKLA. STAT. § 1-201(12) (2009 Supp.).

260. *Id.* § 1-201(3).

another, then the judge would have to acquaint himself with the law of both of those places in order to make a correct determination. This is avoided if a little more time and effort is expended at the outset to determine one “principal” place of performance to govern the contract.

2. *Factors Relevant to Determining the Principal Place of Performance*

The primary disadvantage of this approach is the difficulty in identifying a standard for analyzing a principle place of performance that is firm enough to be used easily and predictably without frustrating either the purposes of the law or the justified expectations or intent of the parties. It would be impossible for this comment to definitively establish such a standard; however, some possible factors include: 1) the quantity of performance rendered in each location, 2) the essence of the contract as a whole, 3) the contract’s place of making, and 4) the domicile of the parties.

The quantity of performance is the most obvious factor and requires little discussion. As *Panama Processes vs. Cities Service Co.* and *Atchison, T. & S. F. Railway Co.* make clear, when a much larger portion of performance is to be rendered in one place, that place should be considered the “principal” place of performance.²⁶¹ However, when performance is spread more equally among the interested jurisdictions — as it is in the above hypothetical — this factor’s import becomes negligible.

Another possible solution is to look to the “essence” of the agreement. That is, which obligation is the most foundational to the contract and where is that duty performed? In the hypothetical above, the essence of the agreement inquiry does not work particularly well because the contract centers on drilling wells located in two distinct jurisdictions. Situations exist, however, where the essence of an agreement could be confined to a single jurisdiction even though parts of the contract would be performed in multiple states. There may be times when the principal place of performance can be determined by the “essence” of the agreement; however, this is just one factor that may or may not be applicable depending upon the facts and circumstances of the case at bar.

Another factor to consider is the contract’s place of making. While it may at first seem anomalous to include the place of making as part of our analysis when determining the place of performance, there is a good reason to do so — both the place of making and place of performance rules are intended to help determine the intent of the parties at the time of contracting.²⁶² Our immediate

261. See *Panama Processes*, ¶ 27, 796 P.2d 276, 287-88; see also *supra* Part IIC (discussing *Panama Processes* and *Atchison, T. & S. F. Ry. Co. v. Smith*).

262. See *Webster*, *supra* note 9, at 385 (“Oklahoma has misunderstood those well-reasoned

inquiry is focused on choosing one place of performance over another; however, our choice-of-law rules as a whole should seek to effectuate the implied intent of the parties. If the place of making is the same as one place of performance, then it is reasonable that the parties can be presumed to have expected that place's law to govern the contract. It is at least more likely that the parties intended or expected the law of the place where both making and performance occur to control over the law of a place where only performance is present.

In the above hypothetical, the contract was executed in State *X* and performance was to occur State *Y* and State *Z*. Suppose instead that two wells were to be drilled in all three states. The parties are more likely to expect a contract which is made in State *X* and partially performed in State *X* to be governed by the laws of State *X* than either the laws of State *Y* or State *Z*. Therefore, State *X* could be the "principal" place of performance in this modified hypothetical.

However, like the essence of a contract, the contract's place of making is not a universally applicable factor for determining the principal place of performance. This factor will only be relevant when deciding between places where relatively equal amounts of performance are to occur. In the unaltered hypothetical, the place of making cannot be said to make either State *Y* or State *Z* more likely the place contemplated or expected by the parties. Similarly, if the amount of performance that occurred in the state of execution was negligible when compared to that which occurred elsewhere, then the place of making factor bears little significance.

The final factor identified in this comment as relevant to determining the principal place of performance is the domicile of the parties. Because we are seeking to glean the implied intent of the parties, their domicile may be germane. If both parties are domiciled in the same place, and their contract is to be performed in part in that place, it is more likely that the parties intended for that place's law to govern their contract rather than the law of another place. However, this factor is not relevant if the parties are domiciled in a state where no performance or only slight performance is rendered.

C. The Per-Obligation Approach Explained

Interpreting title 15, section 162 of the Oklahoma Statutes to allow for more than one state's substantive law to govern a contractual dispute is an adoption

cases which have referred to the place of making and place of performance as significant factors in determining the intent of the parties and the law which will uphold the contract."); accord *Black v. Powers*, 628 S.E.2d 546, 555 (Va. Ct. App. 2006) ("[T]he true test for the determination of the proper law of a contract is the intent of the parties.") (quoting *Tate v. Hain*, 25 S.E.2d 321, 324 (Va. 1943) (per curiam)).

of the doctrine of *dépeçage* — something the Oklahoma courts have not yet done.²⁶³ *Dépeçage* is defined as the application of the rules of different states to govern different issues in the same case.²⁶⁴ While utilization of *dépeçage* is more common in jurisdictions employing an interest-analysis approach to choice of law, the territorial rules can also result in the application of two places' law to the same contract.²⁶⁵ Therefore, the primary rationale for interpreting section 162 to allow for the laws of multiple places to govern the same contract is the same as the goals advanced by the general doctrine of *dépeçage*.

Dépeçage is appropriate when its application: “(a) would result in the application to each issue of the rule of the state with the greatest concern in the determination of that issue, (b) would serve to effectuate the purpose of each of the rules applied, and (c) would not disappoint the expectations of the parties.”²⁶⁶ The overall rationale of *dépeçage* is to subject a contract to only those rules which best advance the intent or expectations of the parties and the purposes of the substantive law involved.

In the hypothetical above, suppose that the law suit concerns only drilling the wells located in State Z. At the outset, the parties knew those wells would be drilled in State Z. The application of the laws of either State X or State Y seems quite arbitrary. It is true that if the place of making rule predominates then the law of State X would govern, and it is plausible State Y could be deemed the principal place of performance because the most wells are to be drilled there. However, application of the law of State Z to obligations which are performed in State Z is logical and consistent with the parties' justified expectations. Surely the parties should expect that obligations regarding the drilling of wells in State Z to be governed by the laws of State Z. It is even probable the drilling contractor will alter its behavior to conform to the laws of State Z. Our choice-of-law rules should not frustrate these expectations without an overriding policy reason for doing so.

Additionally, the definition given to the term “contract” in Part IVB, *supra*, does not mandate that the law of only one place of performance be applied. Even if the contract is the sum of all agreements, it does not necessarily follow

263. See *Perkins v. Chris Hunt Water Hauling Contractor, Inc.*, 46 Fed. App'x. 903, 906 (10th Cir. 2002) (stating that Oklahoma has not ruled on the use of *dépeçage* and finding that Oklahoma case law does not necessarily approve of it).

264. Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973); see also BLACK'S LAW DICTIONARY 505 (9th ed. 2009) (“A court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis.”).

265. Weintraub, *supra* note 1, § 3.4, at 96.

266. Reese, *supra* note 267, at 60.

that only one law can govern the contract. Stated another way — “the place of performance” does not have to be read as “the *only* place of performance.” Even the first *Restatement of Conflict of Laws* (1934) contemplates that a contract can be made up of different promises which can be performed in different places, with the law of each of those places governing the aspect of performance that is to be performed there.²⁶⁷

This “per-obligation” approach, while never addressed or utilized by an Oklahoma court, is also consistent (or at least not inconsistent) with Oklahoma’s case law. Specifically, the rationale squares with the Oklahoma Supreme Court’s holding in *Panama Processes v. Cities Service Co.*²⁶⁸ At issue in *Panama Processes* was a letter agreement whereby the majority shareholder of a Brazilian corporation assured the sole remaining minority shareholder that the corporation would continue to pay dividends and would not expand its productive capacities any further.²⁶⁹ Performance occurred partly at the majority shareholder’s headquarters in New York and partly at the Brazilian corporation’s location in Brazil.²⁷⁰ The dispute was whether the letter agreement was enforceable — New York would enforce the agreement while Brazil would not.²⁷¹

The subject matter of the letter agreement was the future conduct of the Brazilian corporation; conduct that would be performed by the corporation’s officers in Brazil.²⁷² Therefore, under the “per-obligation” approach described above, matters relating to that conduct — here whether an agreement of such conduct was enforceable — should be determined by the law of Brazil. Furthermore, as noted by the court in its opinion, this outcome is consistent with the parties’ implied intent because they should not reasonably expect an agreement made in New York respecting conduct which occurred in Brazil to frustrate the corporate law and policies of Brazil.²⁷³

267. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 355 cmt. a (1934).

268. 1990 OK 66, 796 P.2d 276. Recall that this case is one of only two Oklahoma cases choosing between more than one place of performance. See discussion *supra* Part IIB for analysis of the two relevant cases. Additionally, *Panama Processes* is particularly relevant because it involves a more detailed analysis of the issue than does *Atchison*.

269. See *Panama Processes*, ¶ 2 n.2, 796 P.2d at 279 n.2.

270. See *id.* ¶ 27, 796 P.2d at 288.

271. See *id.* ¶ 5 n.13, 796 P.2d at 280-81 n.13.

272. See *id.* ¶ 27, 796 P.2d at 288.

273. See *id.*

D. The Per-Obligation Theory Better Advances the Purposes of the Choice-of-Law Rules

“The general aim of choice of law is to apply the law that makes the most sense in settling the legal dispute before the court.”²⁷⁴ In the majority of cases, the “principal place of performance” and “per-obligation” approaches will result in the same conclusion because most disputes will center on the place where the most performance occurs. However, when a dispute revolves around a matter that relates to a place of performance that is not the “principal” place of performance, the outcomes of the two schools diverge. The choice-of-law rule that better protects the interests of the parties and the law in these “outlier” scenarios is the rule that should be adopted.

With the aforementioned goal in mind, an examination of the “outlier” cases reveals that the “per-obligation” approach is more desirable than determining the “principal place of performance” because the outcome fundamentally makes more sense. Furthermore, choice-of-law rules should seek to apply the law of the place with the most dominant interest to the case at bar and should be easy to apply.²⁷⁵

In the unaltered hypothetical above, assume that the “principal place of performance” is State *Y* because the most wells are drilled there. Also suppose that the issue before the court is whether the contractor breached a provision of the contract relating to drilling wells in State *Z*. Recall that the contract was entered into in State *X*. The disposition of matters relating to performance which occurred in State *Z* *should be governed by the laws of State Z because that is the place which has the most dominant interest in the resolution of a dispute*. What interest could State *X* or State *Y* have in the resolution of matters relating to conduct which occurred in State *Z*? Certainly whatever interest either does have is subordinate to State *Z*'s interest in resolving the matter. The conclusion that either the law of State *X* or the law of State *Y* should apply to a dispute over performance in State *Z* seems arbitrary and nonsensical, even if that conclusion is founded upon a “well-established” rule.

Furthermore, the “per-obligation” approach is easier to apply than the “principal place of performance” test. While it may result in more than one place's law controlling a dispute, which place that will be and what that place's law will control are readily apparent. Neither the parties, nor the courts, will have to guess at which single place of performance is the

274. McLaughlin, *supra* note 203, at 958.

275. See Elliott E. Cheatham & Willis L. M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 972, 976 (1952).

“principal” place of performance. This certainty of outcome is the hallmark of the territorial choice-of-law rules and should not be frustrated.

Seeking to find one “principal” jurisdiction’s law to govern a multi-state contract simply trades one overly formalistic rule (the place of making rule) for another. The shortcomings of such singular approaches are well documented, and the modern choice-of-law theories have sought to remedy these failings.²⁷⁶ While title 15, section 162 of the Oklahoma Statutes is certainly a vestige of the older, territorial approaches to choice of law, there is no reason why it cannot be construed to allow for a more modern and better-reasoned analysis in those cases where multiple places of performance have been indicated by the contract.

V. Conclusion

Oklahoma’s contractual choice-of-law rules are varied and, at times, confusing. For general contract disputes, title 15, section 162 of the Oklahoma Statutes requires the law of the place where performance is rendered to govern the contract unless there is no indication of such a place. Then, and only then, should the place of making rule be applied. When a contract indicates more than one place of performance and the parties have not selected their own choice of law, then matters relating to each obligation should be governed by the law of the place where that particular obligation is to be performed. This “per-obligation” approach better advances the rationale underlying the choice-of-law field by allowing for sensible conclusions instead of arbitrary results based upon formalistic rules.

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276. See Reese, *supra* note 267, at 59 (stating that the old rigid rules “have been tried and found wanting.”).