

CONTRACTUAL CHOICE OF LAW AND FORUM IN NEVADA AFTER ATLANTIC MARINE: Charting a course to greater freedom of contract in the wake of a unanimous U.S. Supreme Court decision.

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A large Nevada corporation is headquartered in Las Vegas and has the vast majority of its directly owned assets in Nevada but it also owns a major operating subsidiary organized and doing business in an Asia Pacific country. The subsidiary just completed negotiations of a several hundred million dollar credit agreement with a syndicate of Asia Pacific and U.K. banks led by a Hong Kong bank and a London bank. All negotiations occurred in Hong Kong and the loan would be funded and managed through there. No U.S. branches or offices of the banks had any involvement. All proceeds would be used in the Asia Pacific region. The credit agreement would be guaranteed by the Nevada parent. As part of the negotiations the parties agreed that the credit agreement and all ancillary instruments would contain a choice of New York law and choice of New York forum, meaning that they would be governed by and construed pursuant to New York law and any disputes would be resolved in New York courts. The contractual choice of either New York or English law and forum are typical in international financial transactions. While the Nevada parent preferred New York law and forum to those of England, Hong Kong or other another Asia Pacific country, insistence on Nevada law would have required significant trade-offs on other terms including the interest rate and amount of the credit or perhaps even cause the banks to not do the deal at all. Things went smoothly until Nevada counsel was asked to opine that the choice of New York law and forum in the guaranty would be enforceable in Nevada courts. The problem arose because the choice of New York law and forum may not enforceable under Nevada law as it currently exists.

This hypothetical illustrates the challenge of reconciling judicial limitations on the ability of parties to contractually choose a neutral law and forum to govern their business dealings with the realities of transnational and even multistate domestic transactions. This is certainly no criticism of the Nevada Supreme Court as the problem would arise in all but a few states.

Choice of Law

Except for a handful of states which have addressed the problem by statute, many if not all of the remaining states follow Section 187 of the Restatement (Second) of Conflict of Laws (the *Restatement*) as to contractual choice of law. Section 187 generally requires a court to apply the law of the state chosen by the parties unless (i) it has no substantial relationship to the parties or the transaction and no other reasonable basis exists for the parties' choice or (ii) application of the chosen law would be contrary to fundamental policy of a state which has a materially greater interest than the chosen law and would have been the applicable law without the contractual choice. While the Nevada Supreme Court has cited to the *Restatement*, it applies a similar rule but with some important variations. In earlier iterations the Nevada test consisted of a three part test: (i) parties acted in good faith and to evade the law of the real situs of the contract, (ii) substantial relation to the transaction, and (iii) not contrary to the public policy of Nevada.¹ In a subsequent formulation the first factor does not appear

¹ *Sievers v. Diversified Mortgage Investors*, 603 P.2d 270 (Nev. 1979); *Engel v. Ernst*, 724 P.2d 215 (Nev. 1986).

which is not particularly clear and to the extent it is had substance appears subsumed by the second and third factors.²

The Nevada formulation differs from the *Restatement* in two primary aspects. *First*, unlike the *Restatement*, the Nevada formulation focuses on the public policy of the forum, i.e., Nevada. From the perspective of certainty and ease of application, this is preferable to the *Restatement* which first requires a determination of which, if any, jurisdiction has a materially greater interest. If another jurisdiction does have a materially greater interest, then it must be determined if the choice of law would violate a fundamental policy of that state. The cases indicate that the Nevada Supreme Court is restrained in imposing Nevada public policy to overturn contractual choice of law provisions particularly in contracts among sophisticated parties.

In a recent opinion regarding an insurance policy, the court seems to apply the *Restatement* by determining that the state whose law was chosen in the policy has greater contacts. The court then determined that a coverage exclusion in the policy did not violate the public policy of the state of the chosen law.³ It is difficult to determine if this is a change of approach from previous cases, however, because the court also went out of its way to determine in addition that the exclusion did not violate Nevada public policy. In reaching this determination the court relied on a change in the relevant Nevada statute enacted after the operative facts of the case, even though not cited by the parties. In an earlier insurance case the court appeared to follow its previous formulation by simply determining that an aspect of the chosen law violated Nevada public policy and refused to apply it.⁴ Although the court stated that no further analysis was needed once that determination is made, in other aspects of the opinion the court seems to implicitly determine that Nevada had the greater contacts and thus the court may have implicitly followed the *Restatement* although on its face the opinion simply looks to Nevada public policy. In a sense this may be viewed as the opposite of the more recent case in which the court says it is applying the *Restatement* but may have simply determined that Nevada public policy was not violated. It is important to note that with rare exception, the cases seem to have reached the correct results, generally in favor of the parties' choice of law, even if the stated reasoning may not be consistent from case to case. The purpose of this article, however, is not a critique of the case law which is generally fine but as discussed below, to offer a statutory alternative which would provide nearly absolute certainty in the choice of law for certain transactions.

Second, the Nevada formulation does not provide for any alternative to a substantial relationship with the chosen jurisdiction whereas the *Restatement* allows for another reasonable basis for the choice of law. The last paragraph of Comment f to Section 187 of the *Restatement* gives the example of a multistate contract in countries which are strange to the contracting parties or relatively immature as a shipping contract between two such countries. Although not involving immature legal systems, the situation is analogous to that in *Bremen*⁵ in which a Houston-based U.S. corporation contracted with a

² *Pentax v. Boyd*, 904 P.2d 1024 (Nev. 1995).

³ *Progressive Gulf Ins. Co. v. Faehrich*, 2014 Nev. LEXIS 20, 130 Nev. Adv. Rep. 19 (Nev. 2014).

⁴ *Daniels v. National Home Life Assurance Co.*, 747 P.2d 897 (Nev. 1987).

⁵ *The Bremen v. Zapata Off-Shore*, 92 S. Ct. 1907 (1972).

German corporation to tow the U.S. corporation's drilling rig from Louisiana to Italy. The Court upheld the parties' choice of London courts as the forum to resolve their dispute and indirectly the choice of English law as the applicable law. Although an admiralty case, the reasoning of the opinion is instructive. The Court mentioned the benefits of sophisticated businesses from different countries, although preferring their home country courts, being able to contract to resolve their disputes in a neutral forum with expertise in the subject matter. While this reasoning is more compelling in transnational transactions like our hypothetical, it also has applicability in domestic transactions particularly complex financial contracts.

It is very possible that the Nevada Supreme Court if confronted with a situation analogous to the hypothetical similar to the Bremen facts would apply the *Restatement's* other reasonable basis as an alternative to the substantial relationship requirement to uphold the choice of law. However, it is difficult to say if that would be the result. As to our hypothetical, it would be an anomalous result from a policy perspective if Nevada courts would allow a Nevada corporation to submit to jurisdiction in China but not New York. Yet that would be the result under the current Nevada case law. As discussed below, other states have enacted legislation which simply removes the substantial relationship requirement.

Choice of Forum

Our hypothetical includes a contractual choice of forum as well as choice of law. The Nevada Supreme Court has stated that it will uphold choice of forum agreements if they are entered into freely and voluntarily.⁶ Of these cases, the forum selection clause was set aside only in *Tandy* in which the court viewed the contract at issue as a consumer contract for which there were no negotiations, the amount at issue was small, and the forum selection clause was inconspicuous. In all of these cases the chosen forum had a reasonable relationship with the chosen forum so it is not clear how the Court would view a forum selection clause lacking such a relationship.

Somewhat similarly, Section 80 of the *Restatement* states as follows: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."

The U.S Supreme Court Opinion in Atlantic Marine Construction

In the recent case of *Atlantic Marine Construction Company*⁷, the United States Supreme Court addressed a forum selection clause in a contract between a corporation organized and based in Virginia with a Texas corporation for work to be performed in Texas. The contract provided for a Virginia forum but the Texas corporation brought an action on the contract in Texas federal court and the Supreme Court reversed the lower courts for allowing the case to proceed in Texas. While the case is very important for several reasons involving litigation in federal courts, the relevance to this article is the

⁶ *Tuxedo International v. Rosenberg*, 251 P.3d 690 (Nev. 2011); *Tandy Computer Leasing v. Terina's Pizza*, 784 P.2d 7 (1989); *San Antonio Management v. The Eighth Judicial Court of The State of Nevada*, 2013 Nev. Unpub. LEXIS 161 (Nev. 2013) (Unpublished order).

⁷ *Atlantic Marine Construction v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013).

deference given to the contractual choice of forum by a unanimous court. Although the case is not binding on state courts and in passing the court noted that there was no dispute as to the validity of the forum selection clause, the message from the nation's highest court is unmistakable that these clauses should be upheld in all but the most unusual circumstances. While the earlier but also important case of *Bremen* may be viewed as deferring to the parties' contractual choice of forum only in international transactions, *Atlantic Marine* brings the same message for domestic transactions as well.

The Court focused on the forum selection clause as a term of the contract rather than as an application of rules governing the conduct of litigation. "When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain."⁸ As illustrated in our hypothetical, this recognizes that the choice of forum is simply another term of a contract resulting from negotiations in which the party preferring that forum may well have agreed to some other term in exchange.

Although *Atlantic Marine* deals with a contractual choice of forum clause and choice of law clauses present different considerations, it would be difficult to conclude that the reasoning of the opinion would not apply to choice of law clauses as well. It is typical although not universal for a financial or transactional agreement to contain both choice of law and choice of clauses selecting the same jurisdiction. Applying the reasoning of the opinion to the realities of contract negotiations, it would be quite usual for the choice of law and choice of forum to be considered by the parties as one combined term of the contract for purposes of negotiations given the desirability of having the court applying its home law.

Choice of Law and Choice of Forum Statutes

Several states including several states with significant corporate and/or financial centers have addressed choice of law and/or choice of forum by statute. A constitutional analysis of these statutes is beyond the scope of this article but it is difficult to see a serious constitutional question after reading *Atlantic Marine* and *Bremen* and their focus on the choice of forum clause as a term agreed to by the parties. While neither case addresses these statutes, they are in essence nothing more than a statutory codification of the prerogative of parties to a contract to agree that a particular law should govern their contract and that any disputes should be resolved in a particular jurisdiction. *Bremen* and *Atlantic Marine* in substantial part endorse the same prerogative. As to the absence of a reasonable connection to the forum requirement, *Bremen* discusses the benefit of a neutral forum and governing law which by definition will not have a substantial connection to the parties and, as in *Bremen*, may not have a connection to the transaction. While the *Bremen* opinion may be viewed as addressing only international transactions, it is difficult to see how enforcing a forum selection clause (and implicitly a choice of law in the *Bremen* case) requiring a U.S. person to litigate in a foreign country to fulfill its

⁸ *Id.* 134 S. Ct. 568, 582.

agreement would be consistent with due process while enforcing a similar clause as to the courts and law of a sister state would not be. Although constitutionality was not addressed there was not even a mention in either opinion.

A detailed analysis of the state statutes is beyond the scope of this article so only a brief discussion follows. Of the state statutes reviewed for this article, the earliest enacted, New York, as well as the statutes subsequently enacted in California and Illinois follow a similar pattern. Choice of the enacting state's law in a contract is valid whether or not the contract bears a reasonable relation to the state provided certain requirements are met. The explicit elimination of the reasonable relation requirement is a specific change from the *Restatement* formulation, thus upholding the parties' choice with a greater degree of certainty at least in the circumstances addressed by the statutes. The transaction must involve an aggregate of at least \$250,000 and the contract must not be for labor or personal services, relate to a transaction for personal, family, or household services, or the Uniform Commercial Code specifies the law to be followed, such as the laws governing perfection of security interests. On the other hand, these statutes, to the extent they apply, specifically negate the Uniform Commercial Code requirement that the underlying transaction must bear a reasonable relation to the state whose law is chosen.⁹

These three statutes also address contractual choice of forum clauses. They generally provide that a party to a contract may bring an action arising out of that contract against a nonresident or foreign corporation if the enacting state's law was chosen as the applicable law by the contract, a foreign corporation or nonresident agreed to submit to the jurisdiction of the courts of the state, and the underlying transaction involves an aggregate of not less than \$1,000,000 (\$500,000 in Illinois).

The Delaware statute¹⁰ is conceptually consistent with the three statutes discussed above. Structurally, one difference is that the Delaware statute does not address choice of law and choice of forum separately. For the statute to apply, the contract must choose Delaware law and the parties must either be subject to the jurisdiction of the Delaware court either by law or pursuant to the contract. The structural difference may be more form than substance. The other three statutes require a choice of the enacting state's law for a choice of forum to be within the terms of the statute but not vice versa. Parties typically would attempt to choose the same state for law and forum but even if that was not the case, or the choice of forum statute did not apply¹¹, the choice of law statute would not seem to be binding on the court of a different state which may determine to apply the *Restatement* if that was the law of the forum. Thus the ability to choose the law of the contract without the forum may not have the same utility. The other notable difference between Delaware and the other three statutes is that the only Delaware exceptions are those for specific Uniform Commercial Code requirements and the value requirement is only \$100,000.

⁹ *NY CLS Gen Oblig* §§ 5-1401, 5-1402; *Cal Civ Code* § 1646.5; *Cal. Cod Civ Proc* § 410.40; §§ *ILCS* 105/5-5, *ILCS* 105/5-10.

¹⁰ 6 *Del. C.* § 2708.

¹¹ *Borden v. Meiji Milk Products*, 919 F2d 822 (2nd Cir. 1990)

Texas has a choice of law¹² but not choice of forum statute. Subject to certain exceptions, the Texas statute permits parties to agree that the law of a particular jurisdiction may govern an issue relating to a “qualified transaction” if the parties agree in writing that the chosen law will govern the issue, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement and the transaction bears a reasonable relation to the chosen jurisdiction. Without a reasonable relation to the jurisdiction of the chosen law, the choice of law would be enforceable but could be subject to the public policy of another jurisdiction. To meet the requirements of a “qualified transaction,” the transaction must generally involve an aggregate of at least \$1,000,000 (or \$25,000,000 in the case of certain syndicated loan transactions). The Texas statute includes an enumerated, nonexclusive list of contacts that are deemed to establish a reasonable relation to a particular jurisdiction. The Texas statute does not apply to certain transactions, including marriage, adoption, estates and those involving transfers, creation of an interest in or the method of foreclosure on real property. Unlike the statutes discussed above, the Texas choice of law statute applies equally to any contractually chosen jurisdiction, not only Texas. The other statutes apply only to choice of their state law.

The Model Choice of Forum Act is a statute which unlike the statutes discussed above require the courts in the enacting state to honor the contractual choice of another forum but the act is more a codification of case law similar to that of Nevada discussed above so does not provide the level of certainty of the other statutes. Concepts such as relative convenience of different forums and abuse of economic power in obtaining the clause are included in the statute. The Model Act was not widely enacted and was withdrawn in 1975¹³.

The Nevada Choice of Law and Choice of Forum Act; A Proposal

The trend evidenced by the Supreme Court decisions, the choice of law and forum statutes, and Nevada case law is increasing deference to the parties’ contractual choices and less judicially imposed policy which not only can frustrate the choice of the parties but also create uncertainty in business relationships. As a state which purports to be business oriented, the author suggests that the Nevada Legislature take the next step in this trend toward freedom of contract and enact a statute that would uphold the parties’ choice of law and forum within broad parameters regardless of whether Nevada is the chosen jurisdiction. The statute proposed by the author is referred to in this article as the Nevada Contractual Choice of Law and Choice of Forum Act (*NCCA*). While the Nevada Supreme Court as well as the highest courts of other states will likely reach that result at some point particularly if and when the *Restatement* is revised in a similar manner, Nevada consider taking the lead in this trend rather than following possible future innovations in other states. While potential benefits of a proposed statute are typically a matter of conjecture, one immediate benefit would be to remove the uncertainty of the type presented in our hypothetical. It is unlikely that any significant transaction lacking any relationship to New York was derailed due to the uncertainty of the enforceability of a New York choice of law or forum clause against a Nevada entity, yet that result is certainly possible, particularly with the increasing

¹² *Tex. Bus. & Com. Code* §§ 271.001, *et seq.*

¹³ *Original Equipment v. East Coast Resources Group*, 2013 U.S. Dist. LEXIS 70365 (D. Neb. 2013).

internationalization of finance and other industries. More likely, the uncertainty has resulted in Nevada parties receiving somewhat less favorable terms. The NCCA would eliminate a potential impediment for Nevada entities to participate in international or even multistate transactions. Another potential advantage of the NCCA would be as a selling point in encouraging businesses to organize or move their state of organization or operations to Nevada, particularly so long as Nevada is the only providing that degree of flexibility.

The NCCA, in addition to honoring the choice of the law or forum of other jurisdictions as well as Nevada, should not contain the same exceptions as the other statutes. For example the exclusions for services or consumer type transactions seem unnecessary in the context of high price contracts among sophisticated parties. For example, if a famous French artist entered into a multimillion dollar contract with a wealthy Nevada resident to create a work of art for the Nevadan's household, should not a contractual choice of New York law and forum be honored notwithstanding the lack of connection to New York? As a matter of policy, New York would provide not only the benefit of neutrality as mentioned in *Bremen* but also a leading center for international art transactions. Similar to our hypothetical, it would be a perplexing result from a Nevada policy perspective if the Nevada resident could agree to be governed by French law in French courts but not New York law in New York courts.

Unlike the existing statutes discussed above, the minimum dollar threshold for a contract, the value of the contract should not be the only means to qualify for the NCCA. There also should be an alternative for a contract among sophisticated parties to qualify for the NCCA. While it is likely that a reasonable dollar threshold for the contract will provide most of the intended benefits of the NCCA, there are types of contracts which do readily reduce to a dollar value but yet are important contracts between sophisticated parties. For example, a large public Australian company wishes to enter negotiations to acquire a Nevada company. The first step is often due diligence after a confidentiality agreement is negotiated and entered into. If the Australian company has superior bargaining power and insists on Australian or New York law and forum, the Nevada company should not be backed into the Australian alternative simply because the contract did not cover some dollar threshold. Similar types of contracts could be standstill agreements, non-competition agreements without separate consideration, royalty free licenses, or settlements without payments.

The alternative for a contract among sophisticated parties to qualify for the NCCA would address this potential gap in the model of the other statutes. This alternative means of qualifying would be even more important under the NCCA. The NCCA should have a higher minimum threshold for the value of the contract than the existing statutes because of the greater flexibility to choose nearly any choice of law or forum, the amount of the contract being an indicia of sophistication of the parties.

To further the goal of greater certainty in contracting, the question of whether a party is sophisticated should not be left completely in the court's discretion. The NCCA should include specific and objective criteria for making that determination at the time of entering into the contract, giving the parties greater certainty as to the enforceability of their choice of law or choice of forum. The criteria should

not necessarily be the same as those which apply in securities transactions¹⁴ because the indicators of ability to understand a choice of law or choice of forum clause (presumably often with legal advice) are not necessarily the same as the ability to evaluate the merits and risks of an investment and to bear the risk of an investment. Of course, in cases in which the statute is not applicable, courts could continue to use whatever basis they prefer for finding sophistication or lack thereof for purposes of applying the *Restatement* or other common law in determining whether to enforce choice of law or choice of forum clauses.

Other than Texas, the statutes discussed in this article do not address public policy. This is not surprising in that the other statutes address only their own state law which would include the public policy of the enacting state. This approach is similar to the Nevada cases in that the public policy of other states is not a basis for disregarding a contractual choice of law. The *Restatement* approach would invalidate the parties' choice of law if the chosen law would violate public policy of a jurisdiction with a materially greater interest. Public policy of any particular state should not frustrate the parties' choice of law if the contract would be valid under the chosen law provided that sophisticated parties are involved. On state's public policy should not be imposed to upset the bargain made by sophisticated parties by in effect substituting a court's view as to what should not be in a contract for the bargain reached by sophisticated parties. Such parties should be free to choose a state law even if the choice has the effect of sacrificing whatever benefit may have been provided by the law of another state.

To avoid concern that this could have the effect of nullifying Nevada law, two points should be kept in mind. First, as noted above, Nevada case law is consistent with this notion except in cases in which the court considers the sacrificing party is a consumer. Second, in this context, public policy means rules about what can be in a contract, for example, usury, the penalty versus liquidated damages distinction, duration of noncompetition clauses, etc. It does not affect the application of laws governing conduct apart from what may be included in a contract. To illustrate with an extreme example, if a lender required a negative covenant in a credit agreement to the effect that a Nevada borrower could not pay its state or local taxes unless certain financial ratios were satisfied, such a clause would have absolutely no effect on the taxing authorities even if payment of the taxes would be a default under the chosen law.

To the contrary, public policy considerations should be viewed in a manner which upholds the expectations of the contracting parties. If the chosen law would invalidate the contract and there is another jurisdiction with materially greater relation to the transaction under which the contract would be valid, then the contractual choice of law should be disregarded as it should be assumed that the parties intended to enter into an enforceable contract. This is generally the approach of Comment e to Section 187 of the *Restatement* and the Texas statute.¹⁵

A choice of forum clause should not be enforced only in extreme circumstances in which resort to that forum would either (i) subject one or more parties to a judicial system that does not provide impartial tribunals or procedures compatible with due process or (ii) would deprive a plaintiff of all possible

¹⁴ See, for example definition of "accredited investor" in Regulation D, 17 CFR § 230.501(a).

¹⁵ *Tex. Bus. & Com. Code* § 271.007.

remedies due to lack of subject matter jurisdiction of the chosen forum. In the event that a party asserts the circumstances described in (i) it should be required to establish that the inadequacies in the judicial system of the chosen forum are the results changes in that system which occurred after the date of the contract. The parties either knew or should know of the characteristics of the chosen forum at the time of entering into their contract and to invalidate that choice in the absence of a subsequent change could upset the bargain that one or more of the parties may have bargained for. As to circumstances described in (ii), however, the choice of a forum in which absolutely no remedy could be provided due to lack of subject matter jurisdiction must be assumed to have been a mistake and thus avoidable even in the absence of a subsequent change of the rules in the chosen forum. Much like the choice of a law which invalidates the contract as discussed above, it should be assumed that the parties who chose a forum in which they can never get a day in court, also made a mistake.

The standards proposed for determining the existence of these circumstances under the NCCA are derived generally from the mandatory grounds prohibiting a Nevada court from recognizing a foreign-country judgment under the Uniform Foreign-Country Money Judgments Recognition Act,¹⁶ except for the lack of personal jurisdiction because that is provided by the parties' consent to the jurisdiction of the chosen forum by the choice of forum clause itself. A court may look to cases under that act for general guidance as a similar analysis should apply in assessing the suitability of the foreign forum in either context. It is generally difficult to establish the existence of these mandatory grounds.¹⁷

Rather than attempting to discuss each additional point which should be included or not included in a new Nevada choice of law and forum statute, the proposed text of the NCCA is included below as part of this article.

NEVADA CONTRACTUAL CHOICE OF LAW AND FORUM ACT

1. **Choice of law.** The parties to any Qualified Contract, including a Qualified Contract otherwise governed by NRS 104.1301(1), may agree that such Qualified Contract, in whole or in part, shall be governed by or construed under the laws of this State or by the laws of any other jurisdiction (whether another state of the United States of America, or any foreign jurisdiction), without regard to principles of conflict of laws, and such choice of law by the parties shall be valid and enforceable. Without limiting the generality of the foregoing, validity and enforceability shall be without regard to: whether the Qualified Contract or the underlying transaction bears a reasonable relation to the jurisdiction of the chosen law, whether the Qualified Contract would violate the public policy of any jurisdiction (including this State) other than the jurisdiction of the chosen law, or whether the choice of law violates any other principle of the common law of conflicts of law, now or hereafter existing.

2. **Exceptions to Section 1.** Section 1 shall not apply to provisions of a Qualified Contract to the extent, but only to the extent, that:

¹⁶ NRS § 17.50(2).

¹⁷ See *Kreditverein Der Bank Austria Creditanstalt Fur Niederosterreich Und Burgenland V. Nejezchleba*, 2006 U.S. Dist. LEXIS 47011(D. Minn. 2006).

- a. NRS 104.1301(3) specifies the applicable law;
 - b. The law of the jurisdiction of organization or formation of an Entity shall govern the organization, internal affairs, and the duties of officers, directors, managers, managing members, general partners, trustees, or persons acting in similar capacities with respect to their duties in such capacities and liability for violation of such duties; or
 - c. The law of the situs of real property governs the creation, transfer, recording, and foreclosure of interests or liens in real property.
 - d. The Qualified Contract would be invalid or unenforceable under the chosen law but would be valid and enforceable under the laws of the jurisdiction that has the most significant relation to the Qualified Contract or the underlying transaction.
3. **Choice of forum.** The parties to any Qualified Contract may agree that any action or proceeding arising out of or relating to such Qualified Contract (whether in contract, tort, or otherwise) either may or shall be brought in the courts of any jurisdiction (whether or not this State, another state of the United States of America, or any foreign jurisdiction) and such choice of forum by the parties shall be valid and enforceable. Without limiting the generality of the foregoing, validity and enforceability shall be without regard to: whether the Qualified Contract or the underlying transaction bears a reasonable relation to the jurisdiction of the chosen forum, whether the chosen forum is convenient, or whether the choice of forum violates any other principle of the common law of choice of forum, now or hereafter existing.
4. **Jurisdiction of the Courts of this State.**
 - a. If the chosen forum pursuant to Section 3 is in this State, any party to the Qualified Contract may maintain an action or proceeding arising out of or relating to such Qualified Contract (whether in contract, tort, or otherwise) against any other parties to the Qualified Contract in the courts of this State and the choice of forum shall be deemed a consent to the jurisdiction of the courts of this State of any such party not otherwise subject to the jurisdiction of such court, whether or not such consent is explicit.
 - b. If the choice of forum is exclusive and the choice of forum pursuant to Section 3 is not in this State, no party to the Qualified Contract may maintain an action or proceeding arising out of or relating to such Qualified Contract (whether in contract, tort, or otherwise) against any other parties to the Qualified Contract in the courts of this State and if any such action or proceeding relating to the Qualified Contract is brought in this State, then the court shall dismiss such action or proceeding.
5. **Exceptions to Section 4(b).** Section 4(b) shall not apply to the extent that the chosen forum pursuant to Section 3 is not within the United States of America and (i) is under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law, in either case as a result of material changes in such judicial system

occurring after the date of the Qualified Contract or (ii) would deprive a party of all remedies solely due to the chosen forum being completely lacking subject matter jurisdiction. A party resisting the application of Section 4(b), either in attempting to bring an action or proceeding in this State rather than in the chosen forum or in defending against an action or proceeding which has been or is likely to be brought in the chosen forum, has the burden of establishing the applicability of an exception under this Section 5.

6. **Definitions.** As used in this Act, the following terms shall be defined as follows.
- a. **Act** shall mean the Nevada Contractual Choice of Law and Choice of Forum Act.
 - b. **Entity** shall mean any corporation, limited-liability company, general or limited partnership, business trust, trust, or any other form of company, organization, or association whether for profit or otherwise, and whether formed or organized within the United States of America or any foreign jurisdiction.
 - c. **Governmental Body** shall mean any government, nation, territory, multinational governing body, state, province, or other direct or indirect political subdivision thereof including any county, municipality, district, or other local government, any agency, department or instrumentality exercising executive, legislative, judicial, regulatory, or administrative functions of or pertaining to any level of government, or any Entity owned or controlled (through ownership or otherwise) by any of the foregoing, whether within the United States of America or any foreign jurisdiction.
 - d. **Qualified Contract** shall mean any contract, agreement, instrument, or undertaking , contingent or otherwise (i) involving or relating to an amount in the aggregate of not less than \$5,000,000 or (ii) to which all of the parties are Qualified Persons. For purposes of clause (i), the amounts involved or related to more than one related or similar contracts, agreements, instruments, or undertakings entered into by the same parties within any 12 month period shall be aggregated as if a single contract, agreement, instrument, or undertaking.
 - e. **Qualified Person** shall mean any party who is in any of the following categories or whom the other parties reasonably believe is in any of the following categories:
 - i. any Entity with either total assets or annual gross revenues in its most recently completed fiscal year of not less than \$5,000,000;
 - ii. any natural person with either a net worth of not less than \$1,000,000 or annual gross income in the most recently completed calendar year of not less than \$500,000;
 - iii. any Entity of which a majority of the equity interest is owned by Qualified Persons;
 - iv. any Entity of which a majority of the board of directors, managers, managing members, general partners, trustees, or any other governing body, howsoever denominated, consists of Qualified Persons; or
 - v. any Governmental Body.

The determination of status of a party as a Qualified Person shall be as of the date of the contract, agreement, instrument, or undertaking in question.

7. **Miscellaneous.** As the purpose of this Act is to uphold the intent of contracting parties this Act shall be fully retroactive to the same effect as if it had been effective on the date such Qualified Contract was entered into. This Act shall not adversely affect the validity or enforceability of any choice of law or choice of forum not covered by this Act. The rule that statutes in derogation of the common law are to be strictly construed has no application to this Act.

April 2014