

# Choosing Illinois Law in Commercial Contracts: What does it mean?

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# Overview

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- How Choice of Law Matters
- Illinois Choice of Law
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  - UCC Article 9 Secured Transactions Provisions
  - Waiver of Class Actions
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  - Debt Collection
  - Lease and Loan Drafting Provisions
  - Consumer Fraud
- Illinois Jurisdiction



# Authority for Choice of Law

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- Restatement (Second) of Conflicts of Laws §187
- UCC

1. Revised Article 1 (adopted by 29 states and U.S. V.I.; but none of the states that have adopted RA1 have included this language from 1-301(b)(1)):

“[A]n agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated....”

2. Old Article 1:1-105(1) (Still the law in IL):

“Except as provided in this Section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of the other state or nation shall govern their rights and duties. Failing an agreement, this Act applies to transactions bearing an appropriate relation to this State.”



# Authority for Choice of Law

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- ❑ New York (NY General Obligation Law § 5-1401)
- ❑ Texas (Tex. Bus. and Comm. Code §35.51)
- ❑ Illinois Choice of Law and Forum Act (735 ILCS 105/5-1 et seq.)
- ❑ Examples (Choice of Law Clauses; Choice of Forum and Consent to Service of Process Clauses)



# How Choice of Law Matters

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- Factors in Choosing Governing Law
  - What Law the Drafter Knows Best
  - Significant Body of Commercial Law Precedents in State
- Purely Local Issues
  - Real Estate
  - Procedural
  - Entity Formation/Existence/Internal Affairs Doctrine
- Public Policy Issues
- Tort Claims



# Illinois Choice of Law

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## □ Credit Agreements

### ■ Credit Agreements Act (815 ILCS 160)

- Enacted in 1989 in response to “lender liability” claims
- Beneficial bright line test
- Under attack

Kham & Nate’s Shoe Company No. 2, Inc. v. First Bank of Whiting,  
908F.2d 1351 (C.A. 7<sup>th</sup> 1990)

Contractual Principles apply; animating principle, per In re  
Arlington Hospitality, Inc., 368 B.R. 702 (Bankr. N.D. Ill. 2007),  
is “a deal is a deal”.



# Illinois Choice of Law

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- Interest / Usury
  - Interest on Interest problem
  - Late Fees as unenforceable penalties
  - Prepayment/Yield Maintenance (River East Plaza, L.L.C. v. Variable Annuity Life Ins. Co., 490F.3d 718 (7<sup>th</sup> Cir 2007))
  - Illinois's Interest Act (815 ILCS 205/0.01 et seq.)
    - no limits on amount charged to certain entities
    - LLC problem
    - Secured by real estate



# Illinois Choice of Law

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- UCC Article 9 Secured Transactions Provisions
  - Additional Sale Out-of-Trust Statutes (9-205.1, 9.315.01, 9.315.02)
  - Collection and Foreclosure Procedures
  - Forced Sale Without Reserve as Floor in Calculating Liability for Deficiency (9-615(f))
  - Remedies for Secured Party's Failure to Comply – Modified to Prevent Class Actions (9-625)  
(applies to both commercial and consumer transactions)
  - Other Modifications to treat Consumer Transactions as if they were Commercial Transactions





# Illinois Choice of Law

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- Waiver of Class Actions
  - Held to be unconscionable and unenforceable (Kinkel v. Cingular Wireless LLC, 223 Ill.2d 1, 857 N.E.2d 250 (2006))
  - Also held that arbitration clause was enforceable



# Illinois Choice of Law

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- Strict Liability/Vicarious Liability
  - Illinois Courts recognize distinction between commercial and financial lessors (Massey v. Cassens & Sons, Inc., 2007 WL 773380 (S.D. Ill. 2007))
  - Illinois is not a vicarious liability state.



# Illinois Choice of Law

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## □ Indemnities

- Clause indemnifying against a party own negligence upheld (Buenz v. Frontline Transportation Company, 227 Ill.2d 302, 882 N.E.2d 525 (2008))
- Clarity Necessary
- Statutory Exceptions



# Illinois Choice of Law

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## □ Suretyship

### ■ Continuing Guaranty

Phelps Dodge Corporation v. Schumacher Electric Corporation,  
415F.3d 665 (7<sup>th</sup> Cir. 2005)

### ■ Guaranty of Payment v. Guaranty of Collection

Bank of America N.T. & S.A. v. Schulson, 305 Ill.App.3d 941  
(1<sup>st</sup> Dist. 1999)

### ■ Modifications to underlying lease allowed per terms of Guaranty

Zirp-Burnham, LLC v. E. Terrell Associates, Inc., 356 Ill. App  
3d 590, 826 N.E. 2d 430 (1<sup>st</sup> Dist. 2005)



# Illinois Choice of Law

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## □ Non-Compete Clauses

- Strictly construed because a restraint of trade
- Context: More likely to be enforced as ancillary to sale of a business than in an employment setting (Howard Johnson & Co. v. Feinstein, 24 Ill.App.3d 828, 609 N.E.2d 930 (1<sup>st</sup> Dist. 1993))
- Activity restraints subject to a less stringent test than geographic restrictions (Dryvit System, Inc. v. Rushing, 132 Ill.App.3d 9, 477 N.E.2d 35 (1<sup>st</sup> Dist. 1985))
- Activity restraints upheld when “necessary to protect legitimate business interest of employer” (RTC Industries, Inc. v. Haddon, Slip Opinion, 2007 WL 2743583 (N.D.Ill 2007)) (restriction on use or disclosure of confidential information in work for a competitor was necessary, per Judge Grady)



# Illinois Choice of Law

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## □ Releases

### ■ General v. Specific Release of Unknown Claims

- Thornwood, Inc. v. Jenner & Block, 344 Ill.App.3d 15, 799 N.E.2d 756, 278 Ill.Dec. 891 (1<sup>st</sup> Dist. 2003) *Appeal Denied*, 207 Ill.2d 630, 807 N.E.2d 982, 283 Ill.Dec. 141 (2004)
  
- California: Cal.Civ.Code § 1542



# Illinois Choice of Law

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- Debt Collection
  - Citation to Discover Assets (735 ILCS 5/2-1402)
  - No Single Form of Action Rule (cf. California)



# Illinois Choice of Law

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- Lease and Loan Drafting Provisions
  - Collateral Protection Act (815 ILCS 180)
  - Enforceability of Liquidated Damages Provisions after Default (Reorganized Debtors Montgomery Ward & Co. v. Meridian Leasing Corp. (In re Montgomery Ward Holding Corp.) 326 F. 3d 383 (3d Cir. 2003))





# Illinois Choice of Law

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- Consumer Fraud and Deceptive Business Practices Act
  - §2 declares unlawful unfair methods of competition generally; other sections more specific
  - §10a provides for a private cause of action (and attorneys' fees) for a person who suffers actual damages
  - Businesses are able to sue business if they can prove a “consumer nexus,” a nexus between the allegedly fraudulent conduct and consumer protection concerns. Either (1) business “suffered harm as a result of conduct that was directed to the market...



# Illinois Choice of Law

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## □ Consumer Fraud and Deceptive Business Practices Act

- or (2) it was acting as a consumer of the defendant and the fraudulent conduct amounted to more than a mere breach of contract.”  
Commonwealth Insurance Company v. Stone Container Corporation, 2001 WL477151 (N.D.ILL.2001)
- Example of business suffering from market-directed conduct: Russian Media Group, LLC v. Cable America, Inc., Slop Opinion, 2008 WL 360692 (N.D.Ill.2008)



# Illinois Jurisdiction

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- ❑ Commercial Law Experience in Cook County and Northern District of Illinois
- ❑ Be Specific concerning IL Jurisdiction:
  - Avoid Madison County
- ❑ Floating Forum Selection Clauses Enforceable in IL
  - IFC Credit Corp. v. Aliano Brothers General Contractors, Inc., 437 F. 3d 606 (7<sup>th</sup> Cir. 2006)
  - IFC Credit Corp. v. Rieker Shoe Corporation, 378 Ill. App. 3d 77, 881 N.E.2d 382 (1<sup>st</sup> Dist., 2007).