

### EXAMINERS' ANALYSIS OF QUESTION NO. 5

This question calls for a Michigan choice-of-law analysis. As specified in the question, the indemnification clause is void under Illinois law, while under Michigan law it is enforceable.

In resolving contract law conflicts, Michigan courts have traditionally applied "the law of the place where the contract was entered into." *Chrysler Corp v Skyline Indus Servs, Inc*, 448 Mich 113, 122 (1995). However, Michigan has since moved away from that approach in favor of the one contained in §§ 187 and 188 of the Restatement Second, Conflict of Laws, which emphasizes "the law of the place having the most significant relation with the matter in dispute" as being the proper metric. *Id.*

With two exceptions, § 187 of the Restatement provides that the parties' choice of law should govern "if the issue is one the parties could have resolved by an express contractual provision." *Id.* at 126, citing 1 Restatement Conflict of Laws, 2d, § 187(1). The first exception is that "the choice of law will not be followed if the chosen state has no substantial relationship to the parties or the transaction, or when there is no reasonable basis for choosing that state's law." *Id.*, citing 1 Restatement Conflict of Laws, 2d, § 187(2)(a). The second exception "bars the application of the chosen state's law when it 'would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.'" *Id.*, citing 1 Restatement Conflict of Laws, 2d, § 187(2)(b).

In the absence of an effective contractual choice-of-law provision, Restatement § 188 instructs courts to consider several factors in determining which state's law to apply:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract,  
and
- (e) the domicile, residence, nationality, place of  
incorporation and place of business of the parties.

1 Restatement Conflict of Laws, 2d, § 188(2).

Here, the contract between Cobalt and Delmar specifies that it is governed by Michigan law. Moreover, the parties had good reason to choose Michigan law to govern their contract. Both Cobalt and Delmar have significant contacts with Michigan, as Cobalt's principal place of business is in Michigan, and Delmar is a Michigan corporation. See *Chrysler*, 448 Mich at 126-127.

Thus, the parties' choice of law should be applied unless it can be said that Illinois "has a materially greater interest than Michigan (and, under § 188, would have been the state of applicable law in the absence of the Michigan choice of law) and whether the indemnification provision would have been contrary to a fundamental policy of Illinois." *Id.* at 127. Although Illinois was the place of performance of the construction work (§ 188(2)(c) and (d)), the dispute is between two Michigan corporations over a contract that was negotiated in Michigan and that provides for application of Michigan law. Therefore, it cannot be said that Illinois has a "materially greater interest" than Michigan with regard to indemnification such that the parties' expressed preference for Michigan law should be disregarded.

Because Michigan law applies, Delmar's motion for summary disposition should be denied.