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Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act

*Edward H. Cooper**

I. INTRODUCTION

The Uniform Transfer of Litigation Act (UTLA) was undertaken for purposes simpler than the mass consolidation of multiparty, multiforum litigation. It seeks to create an effective tool that can be used to reduce some of the artificial barriers that tradition has erected around the sovereign separateness of the many different court systems in this country. The fact of separate sovereignty must be recognized, however, and to this end consent of both transferring and receiving courts is required. Within the consent requirement, transfer from the court system of one sovereign to the court system of another can improve on present practices in many settings. A court that lacks subject matter or personal jurisdiction can transfer rather than dismiss. An inconvenient court can transfer to a convenient court rather than invoke *forum non conveniens* or perhaps struggle on with the litigation. Should complementing federal legislation be enacted, transfer can work better than dismissal when supplemental jurisdiction is declined, or when a state court concludes that a dispute lies in exclusive federal jurisdiction. Of course an effective structure must address the incidental questions that arise when one sovereign's court system transfers jurisdiction, in whole or in part, to another sovereign's court system. Good answers to these questions are important. Clear answers are even more important. The answers given by the UTLA will be described below.

These simpler purposes, however, did not obscure the opportunities for effecting consolidation of related litigation brought in different court systems. The structural problems are the same, and the effective answers are the same in dealing with many ordinary situations. A contract dispute between a Michigan seller and an Ohio buyer, for example, could give rise to closely related actions in Michigan and Ohio courts. Transfer for consolidation may serve the interests of both court systems and at least one of the parties. Beyond these ordinary situations, transfer also may provide an effective answer for more complex situations involving large numbers of related lawsuits. These situations too were considered. The succinct statement of reasons for transfer in Section 104, indeed, includes "the public interest in securing a single litigation and disposition of related matters." The comment states that this factor "establishes a starting point for consolidation in state court systems of multiparty, multiforum disputes."

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The American Law Institute Complex Litigation Project was well under way when the National Conference of Commissioners on Uniform State Laws Committee began drafting work on the UTLA. The ALI Project had identified the problems that must be surmounted in consolidating large numbers of dispersed lawsuits and had outlined tentative answers. The UTLA Committee deliberately chose to put aside the complex problems that arise in designing a system that asks states to consent in advance to a system that, without specific later consent, can wrest litigation from the courts of an unwilling state and thrust it into the courts of another unwilling state. Any system that has this capacity must be built with great care and no small measure of prophetic vision. The ALI model, sketched in Section 4.02 and fleshed out in the Reporter's Study, seeks to address the central concerns. An Interstate Complex Litigation Panel (ICLP) would be established, composed of one judge from each participating state. The ICLP would have power to direct transfer and consolidation of state court actions without consent of the transferring or receiving courts. Standards for transfer and consolidation are set. Procedures are developed for making transfer and consolidation decisions, for review of those decisions, and for review of some decisions by the transferee court. The managerial powers of the transferee court are defined. Personal jurisdiction and choice-of-law problems are addressed.

The UTLA model is much simpler than the complex ALI model. It also may seem less threatening. Transfer requires consent of both transferring and receiving courts. No state need, against its will, send its litigants elsewhere. Nor must any state, against its will, assume the burden of litigation brought elsewhere. Each state is assured that the transfer determination is made by courts intimately familiar with all of the details of each individual case and with the procedural and systemic advantages of litigation in each system.

The UTLA model, albeit more modest, is intended to serve the same purposes as the ALI model in dealing with multiple parallel actions. It would be difficult to quarrel with the general standard set out in Section 1(a)(2) of the Reporter's Study, authorizing transfer and consolidation to promote "the just, efficient, and fair conduct of the actions" when consolidation "is superior to their separate adjudication." Although there is no central authority that can give guidance, significant consolidation remains possible. Often there will be a natural focus for potential consolidation. Common disasters provide the most obvious examples: an airplane crashes, a hotel burns, a structure collapses. Usually there is a defined geographic location for the event, and usually much of the related litigation will be filed in the local courts. There is an obvious receiving court for litigation filed in other states. The receiving court, moreover, may be willing to undertake the burden of added cases—particularly if consolidation does not entail responsibility for trying individual causation and damage issues—because the added burden is not great, and consolidation helps the court to achieve a single, consistent resolution of common issues under a single choice of law. Significant measures of consolidation may be accomplished under this model, and the experience may support creation of more ambitious programs in the future.

The common disaster example illustrates a deeper problem. Common disaster litigation arising from a single discrete event may represent the outer limits of consolidated adjudication through adversary procedure. Even with hundreds of plaintiffs and several defendants and insurers, several characteristics make effective disposition possible. There is a well-defined occurrence. Most of those injured, if not quite all, can be identified. Resolution of common liability issues often can pave the way for manageable disposition of individual issues, ordinarily by settlement. The challenges presented by widespread injuries dispersed in time and place are much more daunting. Asbestos litigation is simply the most aggravated and familiar example of many product and process liability problems. Most of these problems are not fit for disposition under current substantive doctrines of tort, contract, or property law. Even if these doctrines were intrinsically satisfactory, adversary judicial procedure is not. It has proved difficult to develop plausible means to resolve common liability issues promptly and effectively against defendants. It will prove far more difficult to develop plausible means of resolution in favor of defendants. Beyond that point, we have found no means of achieving any measure of rationally comparable treatment of individual issues. Our model insists on individual assessments of exposure, causation, and damages. Common disposition, whether the labels are those of class actions or consolidation of nominally individual actions, cannot provide individual control of common liability determinations and cannot provide individual consideration and disposition of individual issues. Individual claimants are participants—often quite remote participants—in the processing, not the adjudication, of their disputes. The ALI model is one for the relatively short-term future, and perforce assumes the continuation of present procedures. The present procedural capacities of any court system, state or federal, provide a weak and sinking foundation for the imposing structure needed to effect massive consolidation.

One fundamental contrast between the ALI project and the UTLA model, then, is that the UTLA does not make any wholesale assumptions about the adequacy of adversary judicial procedure to resolve truly massive consolidated litigation. Consolidation will occur only when both the several transferring courts and the receiving court make independent judgments that the resulting package is within the institutional and procedural capacities of the receiving court.

More detailed contrasts remain. There also are detailed similarities. The following sections will explore several of the comparisons that address the choice-of-law incidents of transfer.

II. CHOICE OF MERITS LAW

The ALI Project proposes a sophisticated and elegant set of choice-of-law rules for consolidated proceedings. Such rules, generalized to other settings, may provide the way out of the contemporary choice-of-law morass. That question is well ventilated in other articles in this Symposium. Such rules also will

stimulate vigorous debate and disagreement, as well demonstrated by these articles. The UTLA deliberately refrained from answering these questions. This reticence was due in part to the different setting. The UTLA addresses the full range of noncriminal litigation. A choice-of-law code for the UTLA would have to reach many more questions than are addressed by the ALI Project. Another reason for reticence may be that it will prove easier to reach agreement on relatively fixed rules for the truly mammoth consolidations addressed by the ALI proposal. It is difficult to avoid deep dissatisfaction with the present system. Hundreds or thousands of people may be injured in the same way by a common course of conduct followed by a single defendant or group of defendants. Their claims may be determined by bodies of law that frequently vary in subtle but important detail and that at times vary in more fundamental ways. It is difficult to understand why some should be well compensated, others less well compensated, and still others denied any compensation. The sheer absurdity of the situation may force grudging surrender to rules that dim this sorry spectacle. There is less obvious pressure to regularize choice-of-law practice in smaller-scale disputes. Desirable transfers might often be thwarted if transfer required both transferring and receiving courts to surrender to a dictated choice of law.

Rather than a set of rules, choice-of-law concerns are addressed by the UTLA in an open-ended way. The approach is largely controlled by a central feature of the UTLA structure. Transfer carries control of the litigation to the receiving court. Divided authority is obviously unworkable. There must not be any opportunity for the parties to play one court off against the other, nor any fear that a transfer may come undone if the transferring court is displeased with the receiving court's actions. The transferring court cannot even impose binding conditions on the receiving court. Instead, Section 105 allows it to state "terms" of transfer; Section 208 permits the receiving court to depart from these terms for good cause.

Beyond the problem of divided control lies the prospect that proceedings in the receiving court may develop new information that affects any earlier disposition that might have been made by the transferring court. The affiliating circumstances that inform a choice of law may not be fully developed at the time of transfer.

Within this structure, choice-of-law considerations can be addressed in several ways. The first occasion will be the motion to transfer. The transferring court should consider the likely choice of law in determining whether to transfer. A conclusion that forum law should apply is likely to defeat transfer entirely, or to limit transfer to defined purposes such as consolidated discovery. A conclusion that a particular law should be applied, whether that of the transferring court or some other jurisdiction, can be expressed as a term of transfer. The receiving court likewise should consider the likely choice of law. Choice of its own law would provide a strong reason for accepting transfer. If a particular choice is stated as a term of transfer, the receiving court should accept transfer only if that term is likely to prove acceptable. Once transfer is accepted, however, the receiving court must be free to reconsider the choice of law as the

case develops. An eventual determination that the case should be controlled by the law of the transferring court may justify transfer back under Section 217, but the disruption of repeated transfers weighs against transfer back unless the content of the controlling law is significantly uncertain.

III. PERSONAL JURISDICTION

Recognition of personal jurisdiction is tightly bound up with the choice-of-law process. An exercise of jurisdiction inevitably imposes the court itself as forum, a choice that may be more important than any other. The forum administers whatever choice-of-law rules may be followed, whether imposed from outside as suggested by Section 9 of the ALI Reporter's Study or followed in the free will of the forum. Once the law is chosen, it is interpreted and applied by the forum.

The UTLA and the Complex Litigation Project reflect substantially similar views of the impact of interstate transfer and consolidation on personal jurisdiction. Consolidation of related actions in a single court may justify assertion of personal jurisdiction over an action and over parties that could not be reached if the forum sought to reach that action as a detached unit. This conclusion is influenced by the prospect that consolidation often will reduce the burdens borne by individual parties. It is more heavily influenced, however, by the public advantages that flow from consolidation. Consistent outcomes are perhaps more important in this regard than the savings of judicial resources.

The means used by the UTLA to implement this expansive view of jurisdiction is the open-ended long-arm provision of Section 203. If the transferring court has subject matter and personal jurisdiction, it can transfer to a court that could not independently command personal jurisdiction under its ordinary domestic rules. No attempt is made to enact a phrase that might capture the constitutional constraints that will limit this jurisdiction.

Application of Section 203 can be illustrated by a simple illustration, elaborated from the notes to Section 8, comment f of the ALI Reporter's Study. A Rhode Island plaintiff is injured in a Rhode Island accident involving an automobile she purchased from a Rhode Island dealer and had serviced by a Rhode Island mechanic. She brings suit in Rhode Island against the manufacturer, the dealer, and the mechanic. Consolidated litigation involving the same model automobile is pending in one of two state courts—a Massachusetts court sitting in Boston or a California court sitting in San Francisco. Transfer of the entire Rhode Island litigation to Massachusetts may be appropriate. Transfer of the claim against the manufacturer to California may impose untoward burdens on the plaintiff even apart from assimilation of her personal claim into the mass proceeding. Transfer of the claim against the dealer, whose only connection with California may be selling automobiles made by a manufacturer who also sells automobiles to dealers in California, may be even more obviously untoward. Transfer of the claim against the mechanic may be beyond reasonable contemplation.

The UTLA addresses the risks of improvident transfer by the structure of the transfer process. Transfer requires an order of the transferring court, which can

undertake a case-specific inquiry into the burdens imposed by transfer. The transferring court also can make an informed appraisal of the costs of continuing with the action and an intelligent guess as to the benefits of transfer and consolidation. It is required by Section 104 to consider the interest of each plaintiff in selecting the forum. A decision to transfer part or all of an action provides an impressive assurance of probable fairness. Transfer also requires an order of the receiving court, which reconsiders the same factors as the transferring court from the vantage of its own familiarity with the proceedings, whether the receiving court is at the threshold of possible consolidation or already has consolidated a number of other cases. This double scrutiny should support jurisdiction in many circumstances that would not support a unilateral assertion of jurisdiction by a single court acting in stand-alone litigation. It also may provide greater assurances of fairness than the decisions of a centralized panel, such as the Interstate Complex Litigation Panel (ICLP) envisioned by the Reporter's Study.

The UTLA reaches an additional circumstance that occasionally may prove useful in dealing with large-scale consolidation. Section 103 permits a court that lacks personal jurisdiction to transfer to a court that has personal jurisdiction. Ordinarily this provision will be invoked in ordinary litigation, both when the plaintiff has overreached as to all defendants and when it is desirable to split the action by transferring rather than dismissing as to some defendants. The same need may arise, however, if a court holding consolidated proceedings concludes that it lacks personal jurisdiction as to some claims involving some parties.

IV. LIMITATIONS

The only explicit choice-of-law provision in the UTLA is found in the limitations provisions of Section 209. Section 209 prohibits the receiving court from dismissing "because of a statute of limitations a claim that would not be dismissed on that ground by the transferring court." This provision does not carry with the case all of the limitations doctrines of the transferring court. A court that would apply its own shorter limitations period as a matter of "procedure," for example, can transfer to a court that would apply a longer period. Because under Section 210 transfer takes the filing date in the transferring court to the receiving court, the result may be that transfer preserves a claim that would be barred as untimely if a new action must be filed in the receiving court.

The ALI Project sets out a somewhat similar limitations rule in Section 6.04. Section 6.04 invokes the limitations law of the state whose law is chosen to govern mass tort or mass contract claims. But it adds an exception that if that law would bar a claim that was timely where filed, the claim will be remanded to the transferor court. Apparently, remand is designed to discourage forum shopping by denying the benefits of consolidation to plaintiffs who delay filing beyond the period allowed by the law chosen to govern the claim.

It is a fair question whether either provision is quite right. For present purposes, the important question is whether plaintiffs should continue to enjoy the power that comes from the willingness of many courts to treat limitations as a

procedural matter, automatically referred to the law of the forum. Under the UTLA, a court that has been chosen only for its longer limitations period may feel bound to apply its own period only because it feels caught in this traditional rule. It might prefer to transfer to a more convenient court for an independent determination of the limitations law that should govern the claim. That option is foreclosed by Section 209. If transfer is otherwise desirable, however, at least it remains possible to conduct the litigation in the court best situated to overcome the problems arising from delayed filing. Under the ALI approach, the case must be shuttled back to a court that may have no interest in the dispute beyond the power of general personal jurisdiction and the laxity of traditional limitations choice rules.

V. APPEALS

Allocation of appeal jurisdiction is one of the most difficult problems incident to transfer. The greatest difficulties arise with respect to rulings made before transfer and the transfer determination itself. Appeal of these rulings in the ordinary course, before transfer can be accomplished, could delay transfer so long as to defeat its purposes. Orders made after transfer also can cause complications, particularly if consolidated disposition of some matters is followed by dispersion for further proceedings based on the consolidated disposition.

Section 7 of the ALI Reporter's Study addresses four variations of the appeals problems. First come transfer determinations of a subpanel of the ICLP. A refusal to transfer is not reviewable. An order granting transfer is reviewable only by a review panel of the ICLP. Second is the transferee court's plan and order for disposition of the consolidated litigation, determining which issues are to be resolved in the consolidated proceedings. This plan and order also are reviewable only by the ICLP, and review is available only as a matter of discretion. Thus, a state trial court is reviewed not by any court in that state, or any other state, but by a panel of an interstate entity that may not include any judge from the same state. Third is a final determination of liability. Review may be had in the courts of the consolidation state in two circumstances. If there is a separate adjudication and final determination of liability as to all the claims and parties, review must be sought immediately. If review is sought by a defendant, the appellate court may grant review if that is likely to avoid harm to the party seeking review and to promote efficient and economical resolution of the litigation. If there is a final judgment as to less than all of the claims or parties, appeal may be sought if the same criteria are met and in addition the trial court certifies that there is no just reason for delay. Finally, the transferee state appellate courts entertain all appeals from any court that has decided any issue in a case in which liability was determined by the transferee court.

The ALI appeals structure ensures control in a single court. The advantages are apparent. The consolidated determination of liability would have to be appealed in the transferee state before remand for determination of individual issues in other courts, no matter how undesirable that might be, if courts in other states heard appeals from orders made after the consolidated proceedings. The only alternatives

would be no review of the liability determination, review in the courts of several states, or divided appeals of liability in the transferee state and other issues in other states following conclusion of each separate subsequent proceeding. Single-court control also protects against evasion of the liability determination by indirect means. The disadvantages also are apparent. The appellate courts of the transferee state must review the decisions of courts in other states, applying the unfamiliar procedural law of other states, supervising discretionary determinations, and at times considering both choice-of-law determinations and the application of unfamiliar substantive principles. And accommodations must somehow be made for differences in the occasions for appeal and the standards of review. The proposed appeal structure may make the best possible compromise between the competing horrors, but it shows the complications entailed by the ambitious ALI structure.

The UTLA appeal system also is complicated. An order granting or refusing transfer can be reviewed only in the transferring state, and only by extraordinary writ or comparable interlocutory appeal procedures. No review can be had in the transferring state of orders made before transfer and not reviewed before transfer takes effect. An order accepting or refusing to accept transfer likewise can be reviewed only in the receiving state, and only by extraordinary writ or comparable interlocutory appeal procedure. The courts of the receiving state review all other orders according to their own appeal procedures, including orders made by the transferring court before transfer that were not reviewed in the transferring state before the transfer took effect. This provision for review of orders made by a court in a different state is not as drastic as the ALI provision. There are not likely to be many pretransfer rulings that require review on appeal from a final judgment, particularly since transfer is likely to be made relatively early in most proceedings. If the transferring court prefers to accomplish review within its own system, it can deny transfer or stay the transfer order pending appeal of any orders that can be appealed under local procedure. If the receiving court sends proceedings back to the transferring court, either by return or transfer back, the transferring court system resumes appeal jurisdiction as to unreviewed pretransfer orders and orders made after the return or transfer back. The same result follows on transfer to a third state, which takes over the appeal authority of a receiving state.

The UTLA appeal system works in conjunction with the basic double-consent structure to reduce the occasions for review by courts in one system of orders made by courts of a different state. Quite different systems could be imagined and indeed were considered. The final resolution, however, once again seems simpler than the ALI model.

VI. PROCEDURAL LAW ACCOMMODATIONS

The tradition that the forum adheres to its own procedure may make it surprising to discover the UTLA provisions that effectively govern choice of procedural law. Nonetheless, there are at least three provisions that deserve comment.

Sections 107 and 211 integrate proceedings in the transferring and receiving courts with respect to matters completed before transfer and matters pending at the time of transfer. Completed proceedings have the same effect as in the transferring court unless the receiving court orders otherwise. Pending proceedings are to be completed according to the rules of the transferring court unless either the transferring court or the receiving court orders otherwise. Discovery proceedings are a good illustration of these provisions. Different states may differ with respect to such matters as the frequency of discovery, the occasions for granting and modifying protective orders, the admissibility of discovery information at trial, and the scope of work product protection. The potential disruptions occasioned by transfer are reduced if completed proceedings continue to have the consequences they had in the transferring court. Even as to pending proceedings, particularly outstanding interrogatories, requests to produce, or requests for admissions, it is likely to be more orderly to rely on the procedural law that applied when the requests were framed. These presumptions, however, are subject to the overriding determination that the receiving court must have control over all proceedings after transfer. The receiving court is particularly apt to exercise this control in proceedings that consolidate multiple actions from several states.

Section 212 accomplishes a similar result with respect to orders in effect at the time of transfer. Transfer does not interfere with the continuing effect of any order, but the receiving court may vacate any order of the transferring court as if it were its own. Here too, the model of dominating control in the receiving court requires definitive power to act under the law of the receiving state.

Finally, the optional provisions of Section 213 adopt the choice-of-law rules of the transferring court to govern two sets of issues affecting counsel. The law that would be applied by the transferring court governs contracts between clients and counsel who appeared in the transferring court and any ground advanced to disqualify counsel who appeared in the transferring court. These provisions are designed to address the special problems that might arise from disruption of established attorney-client relationships. The special sensitivity of these matters, however, led to treating this provision as an optional part of the Act. Other matters affecting attorney-client relationships were left untouched, including rules of privilege, confidential communications, and conflicts of interest.

These procedural provisions underscore the basic proposition that transfer between courts in different systems is a complicated undertaking, even in simple two-party actions. The adjustments that must be made when a single court receives actions transferred from several different systems are all the more complex. It seems helpful, however, to provide such guidance as can be managed so that the consequences of transfer can be understood and weighed in the process of deciding whether to transfer or receive.

VII. CONCLUSION

This brief comparison is designed to demonstrate the difficulty of the task undertaken by the ALI model. The UTLA system is not simple. Many of the

potential difficulties of transfer are reduced, however, by the basic structure. Much can be accomplished by requiring the conjoint consent of transferring and receiving courts and by requiring that controlling authority be surrendered to the receiving court.

The UTLA model does not provide a means for effecting consolidation as complete as can be accomplished by the ALI model. Potential transferring courts often will deny transfer. Transfer to several different receiving courts may be more likely than with the ALI model. Choice-of-law determinations are left to the unguided judgment of the receiving court, which may find it difficult to rise beyond the severe limits of all present choice-of-law models to respond to the just needs for coherent and consistent adjustment of interests affected by a common course of events.

The urge to press beyond the limits of the UTLA model, however, may properly be tempered by contemplating the difficulties that arise from any model that seeks to compel more thorough-going consolidation. Any system that asks both sending and receiving states to surrender the transfer decision to an interstate tribunal must provide persuasive answers to many troubling questions. The most troubling question is whether any court anywhere, state or federal, has the capacity to administer mammoth consolidated proceedings. The ambitious ALI model does not attempt to offer any new answers to this question. Perhaps the next most troubling question is whether an interstate consolidation tribunal can be expected to focus as clearly as need be on the specific fairness concerns that attend transfer as to each party to each related action. Transfer determinations by each court entertaining a related action inevitably will lead to fewer transfers and less consolidation; it is far from clear whether that is a bad thing. Among the other troubling questions, the difficulties of defining appeal jurisdiction stand out. Massive consolidation of common liability questions often would not be possible without subsequent dispersion of individual questions of causation and damages. There is no good answer to the ensuing questions of appeal jurisdiction. If the ALI study has proposed the least bad answer, it remains fair to weigh the ensuing costs in the cumulating balance of difficulties entailed by a centralized system for coercive consolidation.

These doubts do not amount to a demonstration that the ALI model is ill-advised. It provides a comprehensive study of the problems that must be encountered in any system for widespread consolidation of related litigation pending in different state court systems. The answers proposed often are ingenious. Some variations of many of these answers may be essential components of any workable system. Only a centralized tribunal, for example, can ensure widespread consolidation, and only a centralized tribunal can develop a sustained tradition and common-law rules. For the present, however, it may be wiser to work for general adoption of the UTLA and development of the experience it can provide with intersystem transfer. There still is something to be said for sturdy simplicity in the face of ingenious complexity.