Conflicts Lect 10 notes

MODERN APPROACHES

With this we move from the 1st Restatement to interest analysis approaches

But first…

Statutory solutions

* There are 2 general choice of law statutes, one in La. and one in Ore. They are interest analysis approaches. We will not discuss them.
* In addition, some statutes have choice of law approaches in them for the area covered by the statute

Although often this is not actually a choice of law rule but the incorporation of another jurisdiction’s law to serve the purposes of the state that has adopted the statute

e.g. Uniform Probate Code

a will is valid if it

* + - 1. complies law of place where executed
      2. or complies with law of domicile at time of execution or at time of death

tries to protect expectations of testator

Borrowing statutes for statutes of limitations are similar

The book has a brief discussion of some puzzles that arise with respect to borrowing statutes. E.g.

Borrowing statutes often use 1st Rest ideas, even though the choice of law approach of the state has moved on

For example, will say a ct should borrow the stat lims of the state where cause of action arose

* even if the forum will actually use the law of the domicile of the parties because of interest analysis
* the best approach is to use the stat lims of the substantive law chosen for the case

Puzzles about tolling rules

West v Theis

1. states sometimes have tolling rules where the stat lims is tolled when the D is out of state
2. tolled bc no PJ was possible in the past (due to Pennoyer)
3. but can result in bizarre results
   1. cause of action arises in Kansas, but D leaves soon after, so stat lims tolls under Kansas law
   2. D lives in Washington for years – well beyond Wash stat lims
   3. Then briefly in Idaho, where sued

held not barred

Idaho had statute that looked to two stat lims

1. where cause of action arose - Kansas, but not barred by stat lims in Kansas bc tolled
2. forum – Idaho - but that was within stat lims, bc also ran only when in state

did not look to Washington

what about stat lims when you have a choice of law provision in a K?

Bridge Prods ND Ill

1. Property bought in VA in contract
2. Del choice of law provision
3. Suit in Ill
4. Should ct use Del stat lims?
5. Ct didn’t
6. said it was procedural
7. Green argued really a question of contract interp

did the stat lims fall under the choice of law provision

**Party Autonomy**

Two issues

Choice of law clauses in Ks

Related issue – choosing K law that validates the K

not same

* choice of law clauses are an issue only when a law is chosen in the K
  + covers many issues under contract
* rule of validation can be used even when no law is chosen in K
  + indeed rule of validation can choose law other than law chosen bc the law chosen invalidates the K
  + rule of validation only answers question of K validity – not other issues (eg remedies, excuses for non-performance etc.)

Nothing on choice of law clauses for Ks in 1st Rest.

* truth is, they were sometimes upheld
* and in absence of choice of law would sometimes choose law that validated contract
  + appeal to party intent

Now states that still have 1st Rest (like VA) will generally uphold choice of law clauses

Approach is largely like that of 2nd Rest, which does have a section on choice of law provisions

Let’s start with some general background on 2nd Rest on contracts…

The general approach is that for an issue in contract the law of the state with the *most significant relationship* applies

* those are the magic words…
* we can call this the section 188 state

Rest 2d § 188. Law Governing In Absence Of Effective Choice By The Parties

* (1) 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.
* …
* (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

The 188 state’s law applies in absence of a choice of law provision

There are a few areas, however, where the 2nd Rest adopts something close to a rule of validation approach

Rest. 2d § 203. Usury

* The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

Why do this?

Don’t want small differences in usury rates to make a difference in K validity

E.g.

- two NYers enter into a loan contract in Illinois with performance in NY  
- interest is 19 %,

- the maximum allowed in Ill in 19%  
- the maximum in NY is 18%

- should choose IL law even though NY is the 188 state – otherwise difference of only 1% will invalidate K  
  
- what if the maximum in NY was 12%?

Then choose NY and K is invalid bc 19% is greatly in excess of 12%

Now…

* Two NYers contract in NY to ship goods in NY
* Under NY law the receiving party is excused from paying until goods are received
* Under Japanese law must pay even if not received unless actual breach is clear
* Can the parties say Japanese law apply with respect to the issue?

YES

* Really not choice of law at all, but simply contracting around a default NY rule
  + - 1. for they could have simply added to the K this clause:
         1. must pay even if late in delivery, unless actual breach
         2. that would be enforced under NY law

2nd rest 187

1. **The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement** **directed to that issue.**
   * 1. Siegelman case also suggests this
        1. “We think it clear that the federal conflicts rule will give effect to the parties’ intention that English law is to apply to the *interpretation* of the contract”

* What if Japanese law considers its law on the matter a default rule, but New York law considers its law a mandatory rule?
* 2nd Rest: Whether the parties could have determined a particular issue by explicit agreement directed to that issue is a question to be determined by the local law of the state selected by application of the rule of § 188. Usually, however, this will be a question that would be decided the same way by the relevant local law rules of all the potentially interested states. On such occasions, there is no need for the forum to determine the state of the applicable law.

OK – now the hard part…

1. what about using choice of law clauses, as the 2nd Rest puts it, concerning “an issue which the parties could not have resolved by an explicit provision in their agreement directed to that issue”
   1. In other words, what if the 188 state has a mandatory rule, not a default rule
   2. One might think the choice of law provision could never be upheld
   3. Consider this analogy…
   4. - a NY court is considering a contract entered into in NY between a 17 year old NYer and another NYer   
      - under NY law the contract is voidable by the 17 year old  
      - will the court enforce a provision stating that the contract is not voidable by any party?
      * of course not
   * will the court enforce a provision stating that PA law (which has no protection for 17 year olds) applies?
     + Again, of course not – that would amount to the same thing as putting a provision in the K trying to contract around a mandatory NY rule

BUT – imagine there is a real choice of law problem

* + - 1. - a NY court is considering a contract entered into in NY between a 17 year old NYer and a Pennsylvanian   
         - will the court enforce a provision stating that PA law (which has no protection for 17 year olds) applies?
      2. why uphold it?
      3. Reduces uncertainty about which law applies when
         1. good to make it certain
         2. that is not a problem in the all-NY context
      4. given the benefits of certainty, even NY might have a reason to yield concerning its mandatory rule
    1. BUT, there is still the worry that a choice of law clause will be used to get around mandatory laws that are protecting vulnerable parties in contracts

Need some balancing

* I will use the 2nd Rest approach as an example of that balancing

But first

Seigelman v Cunard White Star Line (2d Cir 1955)

* I will not discuss the court’s reasoning in the case, but instead look at it from the perspective the 2nd Rest approach
* Also discuss Frank’s dissent

Siegelman (for self and as administrator of wife’s estate) sues Cunard for accident on Queen Elizabeth – boat from NY to Cherbourg

had one year limitation on action in K

had a provision saying Co. could not waive conditions of ticket except in writing

Engl choice of law clause

1. D’s agent offered P’s lawyer a settlement
2. P’s lawyer said would still sue to toll stat lim
3. agent said no need – offer would remain open
4. P did not file
5. 3 mos later D revoked offer
6. P sued 11 mos later
7. Barred?
8. Engl law, barred
   * 1. Need express promise or misrepresentation – not mere expression of intention
9. Not clear but under NY law possibly not barred
10. Ct upheld choice of law provision
    1. will not look at ct’s reasoning
11. Jerome Frank’s dissent is interesting bc he shows ways you can try to wiggle out of a choice of law clause
    1. 1st he says - Not a question “on the K”
       1. saying it is not a matter covered by the choice of law clause
       2. really a matter of K interpretation
    2. Also says choice of law clause refers to whole law – not internal law
       1. In other words the clause chooses the law that would be chosen by an Engl ct and that is NY law
       2. In fact choice of law clauses are not interpreted as referring to “whole law”
       3. Would undermine the purpose of having a choice of law clause, namely certainty
       4. **2nd Rest 187(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.**
    3. Frank also argues choice of law clause is a K of adhesion
       1. P should not be bound
12. How does 2nd Rest deal with it:

187(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either  
(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state 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.

Will not be upheld if…

Chosen state has no *subst* rel

* + - * 1. what counts?

domicile of parties

incl corporate principal place of business or state of incorporation

place of K

place of perf

* + - * 1. generally if all these are in one state, will not accept there is a subst rel elsewhere
    1. “and there is no other reasonable basis for the parties' choice”
       1. Why might there be reason to choose a state’s law even if no subst relationship to that state?
          1. choose Engl or NY law bc well developed compared to the law of the 188 state
    2. Did Engl law have a subst rel to the transaction in Siegelman – probably yes
    3. application of the law of the chosen state 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.
       1. Note that a fundamental policy is not as strong as public policy exception
          1. really about a policy intended to protect someone with unequal bargaining power

eg right of insured against insurance co

example in 2nd Rest

Mass Insurer contracts with NH insured

K says law of Mass applies

K entered into in NH

insured misstates the distance of house from fire hydrant

house burns down

under law of Mass

no rights under K

under law of NH, still has rights

what result?

2nd Rest – NH law

NH is 188 state, has a fundamental policy (protecting insureds) and has a materially greater interest than Mass

* + - * 1. Often will not consider a state to have a fund policy if the protective rule is becoming obsolete

eg capacity of married women to contract

* + - 1. Ct also can take into account fact that it was inserted by dominant part in take it or leave it basis
    1. SO wrt Siegelman
       1. NY was the 188 state
       2. does NY have a mat greater interest? – Yes?
       3. was this a fund policy of NY?
       4. Green argues NO
       5. Not a protective policy of vulnerable party
          1. could have worked the other way around and protected Cunard against statements made by the P