Dreher v. Budget: facts – accident in Virginia, plaintiffs are both Virginia residents, defendants who allegedly caused the accident rented their car in New York (i.e., that is where contract was made). NY law – derivative liability. Va – no such derivative liability. If issue is a matter of tort, Va. law applies (place of harm). If issue is a matter of contract, then NY law applies (place of contracting).

\* Court first tries to characterize the action as one of contract. But there is a problem with this. The plaintiffs are third-party beneficiaries of the contract. Under the 1st Restatement, this would really be a tort case, but the Va. S. Ct. doesn’t want to go with tort. It wants this to be a contract case.

\* There is also an appeal to the public policy of New York in this case. But does this sound like the public policy exception? No, this is even worse than Buchanan. Court is talking about the public policy of New York, not Virginia. The public policy exception is supposed to refer only to the public policy of the forum state, not the sister state. Talking about the public policy of a sister state is merely interest analysis. So this is even worse than Buchanan in using the bastardized form of the public policy exception as a veil for interest analysis.

**Note that Virginia appears, at first glance, to be an old-fashioned 1st Restatement state, but after reading these cases, we see that Virginia doesn’t apply the 1st Restatement straightforwardly in practice. It veers towards interest analysis, without admitting it.**

**10 states still follow 1st Restatement, and it tends to be messily applied – just as we have seen in Virginia.**

**PLEADING AND PROVING FOREIGN LAW**

In the past, a proponent of even sister state law had to prove such law as fact

* + 1. Had to be pleaded like any other fact
    2. Proved through rules of evid (w/ experts)
    3. Decided by jury
    4. Very limited appellate review

This was in large part because the cause of action was thought to be a remedial law of the forum and the content of foreign law was a factual basis in that cause of action for recovery

This is clearly not what we do now with respect to sister state law: Sister state law is subject to judicial notice, with all that that means (i.e., court makes the decision as a matter of law, sister state law not formally submitted as “evidence” requiring proof, de novo review upon appeal, etc.)

While courts are generally required to take judicial notice of sister state law, the situation is mixed with regard to foreign law. FRCP 44.1 provides that a federal judge takes judicial notice of foreign law.

**A separate question: What is party fails to plead foreign law?**

Consider what happens when a party fails to plead any law…?

The claim is generally considered sufficient until the D brings a motion to dismiss for failure to state a claim. So the same thing should arguably be true when the choice of law rules say that foreign law applies but the plaintiff says nothing about it.

What does the D have to say to get the ball in the P’s court – just mouth the words “failure to state a claim”?

* Usually thought that the D has to give an argument – offer a possible cause of action and show why the P’s facts don’t fit it

sometimes courts are said to be permitted to dismiss sua sponte for failure to state a claim when the defendant does not mention it

Green wonders whether a court might not be obligated to do so

1. 2 Californians enter into gambling contract in Cal, perf in Cal
   * + 1. P sues D under contract in Cal state ct
       2. D fails to bring motion to dismiss for failure to state a claim
       3. can the case proceed or must ct bring up CA law
       4. Green: Yes

This would apply when the Californians sue in NV state court too – obligation to protect Cal interests under Full faith and Credit

Maybe no comparable duty with the relevant law is foreign…?

A separate, but related, question: **What if foreign law is introduced by the D or the ct, but the parties do not offer evidence of foreign law**?

Many possible solutions:

- put burden on plaintiff and dismiss  
- put burden on defendant and assume states a claim  
- put burden on party best able to identify law  
- put burden on court  
- use presumption about what law is like to allow case to proceed

This used to be quite common because there were no good law libraries

If it was a general common law case, under Swift the ct would just come to its own conclusion (by forum lights) about what the general common law was

but there were also some presumptions that courts would use

EG what about question of whether the general common law in Pa was overridden by statute? What happens if no evidence was offered about the matter? Rather than dismissing the action, the court would presume that the common law still applies, unchanged by state, in Pa – this would be so even though the forum might have abrogated the common law by statute

Would things be different if the action were under Ca. or Fl. Law (formerly civil law states)? Yes - in these cases, the court would generally NOT presume that the general common law applied

What about Engl. Law? Presume the common law applies. French law? Proponent must offer evidence of what French law is, otherwise, action will be dismissed (unless another presumption was used).

Also note that courts may often presume that fundamental principles of law apply (regardless of whether they are actually a part of the common law). Examples: breach of contract, liability for negligence, battery

This shifts the burden to the party opposing the application of the fundamental principle of law to show that the jurisdiction’s law did not have this fundamental principle.

Courts also sometimes presumed that sister state law/foreign law was identical to forum state law. A dubious proposition, but there is an argument to made for this: that the parties have consented to the law of the forum state when they make no arguments for sister state law/foreign law.

Walton v Arabian American Oil Co (2d Cir 1956)

1. P (from Ark) suing D (Del corp) for Saudi accident involving D’s car driven by D’s employees
2. P sues in NY fed ct
   * 1. Follows NY conflicts rules
     2. Klaxon
     3. Saudi law applies
3. P did not allege Saudi law
4. D did not either
5. Here ct brought up apparently sua sponte that Saudi law applied
   * 1. P refused to offer evid of law
     2. trial ct dismissed and ct app affirmed

Green wonders why we must put burden on P…

the proper approach should be more nuanced – here the D is in a better position to know Saudi law

in some cases a ct will presume that foreign law is like forum law in absence of evid to the contrary:

*Louknitsky v. Louknitsky*  
  
- California state court determining spousal rights in marital property of couple, now domiciled in Ca., while they were in China  
- presumed Chinese law was the same as California’s community property system

Green: because CA has an interest we can understand this as a case of CA simply choosing to apply CA law

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

**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