Choice of law clauses in contracts

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
       3. this is important to keep in mind
    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 – 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
       2. But does not exist whenever there is a mandatory rule
          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. 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

NOTE – with respect to a choice of law clause that *invalidates* the K, 2nd Rest says that if clause was bargained for deliberately and in good faith, then it will be considered a mutual mistake and disregarded

* + 1. If no real bargaining, will hold to term and invalidate K
       1. important bc invalidity is often form of protection for a vulnerable party

Interest analysis

Finally – heart of course

Basic idea –

* Scope of law should be read in light of law’s purposes unless text answers the matter

Harris v. Harris (Ga. 1984)  
two married but separated Georgians get into car accident in Georgia in which husband is negligent – wife sues  
does Georgia spousal immunity rule apply?

Court might have concluded that text answers the question – separated spouses are spouses

* But did not take the matter to be answered by the text
* So answered it by law’s purposes
  + Promoting marital harmony and avoiding fraud
* No marital harmony to promote if spouses are separated
* And not more likely to collude than unmarried people
* So law is not applicable
* GA negligence law applies instead

Interest analyst claims same approach applies for territorial scope

* Does law apply to the cross-border facts?
* Can’t answer by text – laws do not limit their territorial scope in text
* With only a few exceptions
* Wis. Stat. § 895.03 (action for wrongful death “caused in this state”)

So must answer by law’s purposes

two married Californians get into car accident in Georgia in which husband is negligent, wife sues  
does Georgia’s spousal immunity rule apply?

* Answer by looking to law’s purposes
  + Promoting marital harmony and avoiding fraud
* GA not interested in marital harmony of Californians
* And GA not interested in fraud concerning CA insurance contracts
  + Ffraud will be felt in CA
* So not applicable
* CA law is applicable
  + Purposes of CA negligence law is compensation and deterrence
  + CA not interested in deterring negligent husbands, even CA husbands, in GA
  + BUT is interested in compensating CA wives harmed by their negligent husbands
  + So CA law applies

Green’s criticism thinks interest analysis is misguided

BUT, just like you need to know how to use the 1st Rest, even though its view about exclusive lawmaking power based on territory is nonsense, so you need to know how to do interest analysis , even though its view about state interests is nonsense

1. Example – Currie on Milliken v Pratt

Goes through all scenarios and shows how 1st Rest gets interests wrong

Applies law of uninterested state

When both states are interested can lead forum to vindicate the interest of the lother state

Currie thought that was wrong – sort of a form of treason

False conflict – only one interested state

True conflict – more than one state interested

Is it a false conflict when both states have the same law? NO

One might think it means that court doesn’t need to make choice of law decision in such a case, because laws are the same

BUT is that true? It may be that neither state is interested in its law applying

remember Marie v Garrison

It is false conflicts that motivate the move from 1st Rest to interest analysis

1. 1st case to make the change
   1. Babcock v Jackson
      1. NY P – guest in car w/ NY D-host
      2. Crashed into stone wall in Ontario
      3. Question of application of Ontario guest statute
      4. Guest statute exists…
         1. to prevent collusion between guest and host to defraud host’s insurer
      5. Ontario interested only if Ontario host
      6. So Ont not interested
      7. NY is interested in its guest-host negligence liability rule applying
         1. Purposes…?
            1. Deterrence of negligent hosts

Not interested because negligence occurred in Ont

* + - * 1. Compensation to guests harmed by negligent hosts

Interested because there is a NY guest deserving compensation

* 1. Dym v Gordon
     1. P and D both NY domiciliaries
     2. BUT taking courses at U of Colo
     3. Collision with another vehicle (from Kansas) in Colo
     4. Colo has guest statute
     5. NY has host liability for negligence to guest
     6. How not like babcock?
        1. another non NY party in accident
        2. relationship started in Colo
     7. Also new theory of guest statutes
        1. make ungrateful guests later in priority
        2. Colo interested bc the guest host relationship is a Colorado one
     8. So true conflict, bc NY interest as well
        1. wants recovery for NY guest

nevertheless NY ct applied Colo law