RENVOI :

When your choice of law rule says use the law of X that is taken to mean – use the law that X’s courts would

Distinguish désistement – where the fact that the courts of X would not use their own law means that you should not too

Under renvoi if the courts of X would use Y’s law that means use Y’s law

Under désistement if the courts of X would use Y’s law, that means do not use X’s law

* Désistement is more relevant to interest analysis when the fact that X’s courts would not use X’s law is a reason to think X is not interested in its law applying

Renvoi is an escape device

* If you don’t like the law that your choice of law rule points to (say the law of Pa) – look to Pa’s choice of law rules and see if it would chose something other than Pa law for those same facts – if so, mention it to the court
* But more fundamentally renvoi is accepted under the 1st Rest in limited cases

**In re Schneider’s Estate** (1950): normally Swiss court would take jurisdiction of property, but the property has already been sold and the money is sitting before the NY court; *legitime* v. common law testator discretion;

NY choice of law is law of situs for rights in event of death

BUT the rule is not to use situs state law but the law that a situs state court would use

Here ct concludes a Swiss ct would sue NY law so applies NY law

Will this lead to circling?

The swiss court also refers to what a NY court would do…?

Not generally – the situs court does not have a reason to try to imitate what another court would do, even if it does think that the other jurisd’s law should apply

* In Schneider it referred only to NY internal law

In addition, it is often the case that when you adopt renvoi, situs court will refer to situs law

* + - MOST of the time it just doesn’t matter whether you adopt renvoi or not
      * The same reasoning that led state A to look to law of state B will lead state B to look to law of state B
    - assume that every state had same choice of law rules
      * + Outcome would be exactly the same under renvoi or not

Circling only if = A wants to do what B’s courts do and B wants to do what A’s courts do does

This might have happened in…

In re Annesley

British subject in France dies

* domiciled in Fr according to British law
* NOT according to Fr law
* what law governs her movable property?
  + British law – law of domicile at death
  + French law – use law of nationality
* A French court had decided this issue as follows:
  + Chose Engl law, but thought this meant whole law – what an Engl ct would do - which referred back to French law
  + France decided to accept the reference as one to its internal law
  + Basically French court was saying we will do as Engl ct does and assumed that Engl would not say do as France ct does, but would choose internal law of France
* Now an Engl court had to decide
  + The truth is that the French court was wrong
  + Engl wanted to do as France ct does
  + Now we really have a circle
* Eng ct solved the problem by decided to do what the French ct had earlier done
  + - That is choose Fr internal law
    - But that was only because the Fr ct wrongly thought that an Engl ct would choose internal law of France
    - the Engl ct knew that was wrong…

Green – it is theoretically possible to have circling, but in general one ct will have a reason to break the circle of mutual deference

Americans generally reject renvoi

1st Rest

* only exceptions
  + land title and divorce decrees

2nd Rest

* renvoi only when
  + the objective of the particular choice of law rule is that the forum reach the same decision as that of another state (on the same facts)
  + examples, validity and effect of transfer of interests in land
  + and succession of interests in movables in a decedent’s estate

Some cts wrongly say that renvoi sometimes exists for marriage, wills

Green: this is really another phenomenon

Forum choice of law rules say law of X applies and law of X *incorporates or borrows* a standard from Y – thus will mean that by using the law of X one uses Y’s standard

Final Escape Device:

Public policy exception

* truly an escape device, in the sense that its purpose is to avoid the application of the law chosen by the 1st Rest
* always was around
  + still is around under 2nd Rest.

Intro to idea

Loucks v Standard Oil (NY 1918)

- Ps are administrators of estate of Everett Loucks (NY domiciliary with wife and children NY domiciliaries)

- killed by negl of Standard Oil’s servants

- Ma has statute that allowing for liability due to death from negligence

- not directly tied to damages

- tied to degree of culpability

- between $500 and $10,000

- Ds argued that law was penal (we will discuss)

- also argued for public policy exception

- rejected

- not enough that NY and Mass law are different

- Must “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”

1. assume that Cardozo had accepted that public policy exception applied
   1. what would he have done
      1. dismissed action?
      2. Applied NY law?
      3. Applied Mass law without Mass statute?
   2. Answer – dismissed action
2. Consider idea of vested rights
   1. Argues for Dismissal
3. Assume that after the dismissal, the action is brought in CT
   1. Can one argue res judicata?
   2. No, like dismissal for lack of jurisd
4. The idea of dismissing w/o prejudice follows from vested rights theory –
5. A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, ‘follows the person and may be enforced wherever the person may be found.’ The plaintiff owns something, and we help him to get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid. ‘The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there‘ (Cuba R. R. Co. v. Crosby, supra, 478). Sometimes, we refuse to act where all the parties are non-residents. That restriction need not detain us: in this case all are residents. If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare.

Public policy exception

* 1. True public policy exception
     1. This is a jurisdictional theory
     2. The cause of action is so offensive to the forum state that the action is dismissed without prejudice.
     3. This coincides with the vested right theory. Other courts can always take the case
  2. False public policy exception
     1. A veil for interest analysis for 1st restatement jurisdictions.
     2. The 1st restatement jurisdiction does not want to change its choice of law rules, but uses the public policy exception to get around the choice of law provision applicable to the case.
     3. Apply forum law rather than dismissing the case, because forum is interested

**Mertz** (1936):

* 1. NY Wife suing NY husband for damages due to accident in CT
  2. Both from NY
  3. NY law – interspousal immunity
  4. CT not so – interspousal liability
  5. NY ct applied NY law for two reasons

1. capacity of parties to sue/be sued etc. is governed by forum law, e.g. whether husbands can sue wives is procedural;
2. bastardizing the public policy exception – using PP exception as a reason to apply forum law bc forum is interested

if CT law is contrary to the public policy of NY, NY ct really should dismiss the action without prejudice, but instead the NY court applies NY law

Mertz court says you find public policy in the laws of the state; but obviously you can’t use the public policy exception whenever the forum’s laws are different from a sister state’s

**Holzer**: (1938):

* 1. German Jew brings suit for breach of contract against D (which owns Schenker & Co, the employer of P)
  2. Two causes of action
     1. Dismissed in breach of the contract, asks for damages
     2. Provision in contract says that he receives $ if, through no fault of his own, he is unable to fulfill contract
  3. D’s defense
     1. German law required termination, bc he was Jewish
  4. Is this void on ground of public policy?
     1. Ct concludes NO (!!)

How can NY cts think that CT interspousal liability rule is contrary to NY public policy but Nuremberg decrees are not…?

Green:

1st this is not a case where NY has a legitimate interest in applying NY law

* Not like Mertz
* In addition, the pure public policy exception would lead to a dismissal w/o prejudice
  + This is what the D wants! Won’t help the P

The P needs German law to have a cause of action but doesn’t want a German defense to apply

This is more problematic

Compare - German law requires everyone who is fired for being Jewish to pay for clearing out his office  
Deutsche Reichsbahn sues in New York for costs of cleaning out Holzer’s office  
Result? Obvious PP exception would apply

Kilberg’s use of PP exception was problematic in the same way that the P’s requested use of the PP exception was in Holzer

Kilberg v N’eastern Airlines  
- NY P, Mass D, plane accident in Mass  
- Ticket brought in NY  
- Mass limit on damages for wrongful death  
- Suit in NY  
- Court characterizes as procedural  
- But also refuses to apply limit on PPE grounds

* P wants the application of Mass law but without a part of Mass law (namely the damages limitation

Argument that if you want Mass law you get all Mass law – same for Holzer

1. Penal laws
   1. Criminal law of another jurisd is not applied
      1. Ct always applies its own criminal law
      2. Choice of law in criminal cases is really answered by jurisdiction
   2. BUT cts used to read the rule that penal law of another jurisd is not applied more broadly
      1. Punitive damages used to be characterized as penal law.
   3. Primarily applies to criminal law now or a civil case for a fine that goes to the state