1. **Pleading & proving foreign law**
2. 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. If this were like domestic law, is there a problem?
      1. could argue there is because duty to protect sister state interest
      2. but no FF&C issue for Saudi Arabia
   6. BUT additional element
   7. Here ct brought up apparently sua sponte that Saudi law applied
      1. In this case, P refused to offer evid of law
         1. Basically still treated as Q of fact and did not plead fact so dismissed
      2. influence of NY rule on pleading and proof of foreign law (Erie)
         1. we can ignore that element
   8. Green questions whether this is a good approach
      1. Put burden on party best able to determine law
3. Louknitsy
   1. Cal ct assumed Chinese marital property law is same as Cal
   2. in that case there was a Cal interest – parties were now domiciled in CA
      1. so simply can say that Cal law was applied

MODERN APPROACHES

Statutory solutions

OR and LA have general choice-of-law statutes – we will ignore them (basically interest analysis)

Interested in statutes that have choice of law for their own application,

* 1. Uniform Probate Code
     1. widely adopted
     2. will is OK if
        1. complies law of place where executed
        2. or complies with law of domicile at time of execution or at time of death

Borrowing statutes for stat lims

Already have seen them

* 1. Problem of using 1st Rest ideas for borrowing stat lims
     1. Where cause of action “arose”
     2. Can get a different stat lims from the state whose law applies
     3. Best to use the stat lims of the subst law chosen for the case
     4. NOT perfect uniformity (still forum shopping)
     5. You still have diff stats lims if there are different choice of law methods for the subst law
     6. EG running out of time
        1. don’t’ go to state Cal,. bc it will choose state Mo’s law as subst law, and stat lims of Mo is short
        2. Go to state Fl, bc it will choose state Kansas subst law and so its longer stat lims
     7. Still not as bad of forum shopping as simply using forum’s stat lims
  2. Bridge Prods ND Ill
     1. Property bought in VA in contract
     2. Del choice of law provision
     3. Suit in Ill
     4. Should you use Del stat lims?
     5. Ct didn’t
        1. said it was procedural
        2. but that meant using borrowing statute
     6. Ill reads borrowing statute as using 2nd Rest most sign rel test
        1. argued in favor of Va
     7. so BARRED
     8. Makes sense
     9. I argued really a Q of K interpretation
        1. did the stat lims fall under the choice of law provision?

**Party Autonomy**

Choice of law clauses in Ks

Related issue – choosing law that validates the K

not same

* choice of law clauses can apply only when a law is chosen
* rule of validation can be used even when there is no choice of law clause
  + rule of validation could choose law other than law chosen in choice of law clause
* rule of validation only answers Q of K validity – not other issues
* choice of law clause, if valid, answers many other questions about interpreting the contract

Rule of validation in 2nd Rest with respect to usury:

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.

Choice of law clauses

**1st Rest**

Nothing on choice of law clauses for Ks

So we will consider 2nd Rest

First….

* + - 1. wholly NY contract
      2. to ship goods within NY
      3. not there on time
      4. under NY law are excused from paying
      5. Japanese law must pay until actual breach
      6. can say Japanese law applies
      7. for they could have simply added that bit of Japanese law to the K
         1. could have said “must pay even if late in delivery, unless actual breach”

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. NY law gives default rules, but allows people to contract around it by specifying otherwise
        1. If so can simply choose another state’s law as labor saving device

* What if Japanese law considers the matter a default rule, but New York law considers a mandatory rule?
* 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.

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 (the state whose law would otherwise apply) 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. Provision is a contract of adhesion
    2. also – this is not a question covered by the choice of law provision because it is not a question “on the K”
       1. saying it is not a matter covered by the choice of law clause
       2. this is important to keep in mind
    3. 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.**
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

place of negotation

* + - * 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