

- I. Traditional Approach to Choice of Law
 - a. Jurisdiction-Selecting Rules
 - i. Introduction
 1. Story Approach
 - a. Territoriality
 - b. Comity
 2. Beale Approach
 - a. Vested Rights
 - ii. First Restatement
 1. Grew out of the Beale approach
 2. Tort
 - a. Governed by the law of the place of the injury, rather than the place of the negligence (*Alabama Great Southern v. Carroll* – p. 6)
 - b. Rights vest in the place where the last act necessary to create liability occurs
 3. Contract
 - a. Validity and effect determined by the law of the place where the contract was made (*Milliken v. Pratt* – p. 17)
 - i. Place in which the principal event necessary to make a contract occurs
 - ii. Majority – place where acceptance is sent
 - b. Performance determined by the law of the place of performance
 4. Real Property
 - a. Governed by the law of the place of the property
 - b. Includes interests in land such as leaseholds
 5. Movable Property
 - a. Generally governed by the law of the place of the property at the time when the controversy arises
 - b. Exceptions for probate and marital property
 6. Wills and Probate
 - a. Validity determined by law of the place where the will was made
 - b. Interests in real property governed by the law of the place of the property, but may refer to substantive law of decedent's domicile
 - c. Interests in movable property governed by the law of decedent's domicile
 7. Domicile
 - a. Always have only one domicile
 - b. Must actually reside in a place with intent to remain
 8. Marriage
 - a. Validity determined by the law of the place where vows were exchanged

- b. Status conferred by marriage determined by the law of the place of domicile
 - 9. Criminal Law
 - a. Court must have jurisdiction
 - 10. Procedural Matters
 - a. Governed by the law of the forum state
- b. Escape Devices
 - i. Used by courts to get around First Restatement rules
 - ii. Characterisation
 - 1. Classify case as belonging to a particular body of law in order to use that body of law s m ore favourable rules
 - iii. Substance and Procedure
 - 1. Forum law used to determine whether an issue is substantive or procedural
 - 2. Laws that determine rights are substantive
 - 3. Laws that confer remedies are procedural
 - a. Governed by forum law
 - 4. Statute of Limitations
 - a. Typically procedural
 - b. Statute of limitations aimed at the specific cause of action is substantive (*Bournias* – p. 55)
 - iv. Renvoi
 - 1. Attempt to achieve consistency and stop forum-shopping
 - 2. When looking at foreign law, determine whether to look at “in terna l” law (the law that the foreign state would apply if the case w ere entirely dom estic) or “w hole law ” (the law that the foreign state would actually apply in the multi-state case presented, including choice of law rules?)
 - a. “Reject” by considering foreign internal law only
 - b. “A ccept” by considering foreign whole law
 - i. Partial renvoi when foreign choice of law rules refer to the internal law of another state
 - 1. “R em ission” w hen reference is back to the forum
 - a. Forum applies its own law
 - 2. “T ransm ission” w hen reference is to a third state
 - ii. Total renvoi when foreign choice of law rules also refer to whole law of another state
 - 1. If reference is back to the forum, the forum will usually give up and apply its own law
 - 3. Problems
 - a. Courts would need to know foreign renvoi rules
 - b. If all states accept renvoi, becomes an endless cycle
 - 4. Renvoi is generally rejected

5. Exceptions
 - a. Real property title - whole law of situs
 - b. Divorce validity – whole law of domicile
 - c. *In re Schneider's Estate* (p. 60)
 - i. Real property title exception, so whole law of situs applied
 - ii. Whole law of situs referred back to law of domicile (the forum) – remission
 - iii. Court avoided finding total renvoi
 - v. Public Policy Exception
 1. No enforcement of applicable foreign law where that law is repugnant to the fundamental public policy of the forum
 2. Different forum law is not enough (*Loucks* – p. 69)
 3. Holding citizen of another country to a contract made in that country and performed in that country “cannot be against... public policy” (*Holzer* – p. 74)
 - vi. Penal and Tax Exception
 1. No enforcement of another state's criminal laws or punitive civil laws
 2. No enforcement of another state's revenue laws
- c. Pleading and proving foreign law
 - i. Foreign law traditionally a question of fact
 1. Must be pleaded and proved
 2. Expert witnesses are typically required
 3. Decided by finder of fact, with limited appellate review
 - ii. Statutes often used to allow judicial notice of foreign law
 - iii. *Walton v. Arabian-American* (p. 82) – directed verdict against plaintiff who had failed to plead and prove foreign law, even though neither party had raised pertinent foreign law and forum law permitted recovery, when forum choice of law rules required reference to foreign substantive law
- d. Choice of law in Virginia
 - i. *Jones v. R.S. Jones*
 1. Virginia applies First Restatement „place of injury” rule in torts cases
 2. *Bournias* rule used to determine whether statute of limitations is substantive or procedural
 - ii. *Buchanan v. Doe* – John Doe tort suit in uninsured motorist case characterised as contract case when plaintiff sought recovery from their own insurance company

II. Modern Approaches to Choice of Law

a. Statutory Solutions

- i. Statutes to validate wills that were validly executed elsewhere
- ii. Uniform Commercial Code allows parties to choose which law applies, otherwise the forum state's version of the code applies to transactions "bearing an appropriate relation" to the forum
- iii. Proposed statute to resolve no-fault insurance law conflicts
- iv. "Borrowing statutes" requiring a court applying foreign substantive law to also apply the foreign statute of limitations

b. Party Autonomy and the Rule of Validation

- i. Party autonomy
 1. Presume that parties intended contract to be governed by the law of the place of contracting
 2. Applies to contractual interpretation, not validity – otherwise parties can avoid state policy (*Siegelman* – p. 98)
- ii. Rule of validation
 1. Apply whichever law would make the contract valid
 2. Assume intent to be bound (*Pritchard v. Norton* – p. 95)
- iii. Contractual choice of law
 1. Must be bona fide
 2. Law chosen must have some relation to either the making or performance the agreement (*Siegelman* – p. 98)
- iv. Sending movable property to a foreign state and keeping it there raises presumption of intent to resort to foreign law (*Wyatt v. Fulrath* – p. 109)

c. Interest Analysis

- i. Consider the interests of each state in the determination of the issue through application of its law
- ii. What is the purpose of the particular law at issue, and does that purpose apply to the current situation?
- iii. False Conflicts
 1. Laws seem to conflict, but only one state has an interest in the application of its law
 2. The law of the state where a claim vests or with the most significant contacts should not be applied if that state has no interest in the case
 3. *Tooker v. Lopez* (p. 134) – although tort occurred in foreign state, foreign state's guest statute did not apply because its purpose was to prevent fraud against its domestic insurers, when insurance company and other parties were all residents of forum state
- iv. True Conflicts
 1. Both states have an interest in the application of their law – for example, forum state with damage cap (to prevent tort abuse) is asked by plaintiff to apply foreign state's law which has no such cap (to ensure adequate redress)

2. Ways of resolving true conflicts
 - a. Always apply forum law (rejected) – courts an instrument of state policy (*Lilienthal* – p. 168)
 - b. Interpret forum law to avoid or reduce conflicts
 - c. Comparative impairment – which law's purpose would be more impaired by not being applied?
 - d. If both states are equally interested and would be equally impaired, apply forum law
- v. Unprovided-For Cases
 1. If no state has an interest, apply forum law (*Erwin* – p. 162)
- d. Place of the Most Significant Relationship
 - i. Second Restatement approach
 - ii. Adopted by a majority of states
 - iii. Tort
 1. Law of the state with the most significant relationship to occurrence and parties
 2. Factors to consider:
 - a. Place where injury occurred
 - b. Place where conduct causing injury occurred
 - c. Domicile, residence and nationality of parties
 - d. Place where relationship between parties is centred
 - iv. Contract
 1. If an explicit provision in the contract could have resolved the issue, the intent of the parties governs
 2. If the issue could not have been resolved contractually, the intent of the parties governs unless:
 - a. Chosen state has no reasonable relationship to the parties or the transaction and there is no other reasonable basis for the choice; or
 - b. Application of law of the chosen state would be contrary to fundamental public policy of a state which has a greater interest in the determination of the issue and whose law would otherwise apply
 3. If there is no effective party choice, apply law of state with most significant relationship to parties and transaction
 4. Factors to consider:
 - a. Place of contracting
 - b. Place of negotiation of contract
 - c. Place of performance
 - d. Location of subject matter of contract
 - e. Domicile, residence and nationality of parties
- e. Better Law
 - i. Choice-Influencing Considerations:
 1. Predictability of results
 2. Maintenance of interstate and international order (comity)
 3. Simplification of judicial task

4. Advancement of forum's governmental interests
 5. Whether a law is „better“ in socio-economic terms
 - ii. *Milkovich v. Saari* (p. 225) – last two factors are most important
- f. Problems Old and New
- i. Dépeçage
 1. Apply modern choice of law on issue-by-issue basis
 2. Outcome may be a result that differs from that of either jurisdiction
 - ii. Renvoi
 1. Renvoi eliminated under interest analysis (*Pfau* – p. 244)
 2. Renvoi would only be accepted if the foreign state has an interest and the forum state has no interest, in which case interest analysis would require application of the foreign state's internal law
 3. This ignores the existence of transmission renvoi
 - iii. Choice of Law in Federal Courts
 1. Federal court sitting in diversity applies choice of law rules of state where it sits (*Klaxon* – p. 700)
 2. Federal court receiving a case applies law the transferring court would have applied (*Van Dusen* – p. 703)
 - iv. Complex Litigation
 1. *In re Air Crash* (p. 260): in consolidated litigation, apply choice of law rules of each original forum state
 2. *In re “Agent Orange”* (p. 273): modern approaches to choice of law all call for an essentially identical analytical inquiry, and it is “sensible” to treat all plaintiffs in the same way, so formulate and apply “national consensus” law
 3. Constitutional limits on application of choice of law still apply (*Shutts* – p. 333)
 - v. Internet
 1. Personal jurisdiction requires:
 - a. State jurisdiction directly or from long-arm statute
 - b. Due process
 - i. Party is domiciled in state; or
 - ii. Party has consented to jurisdiction, for example by contract, waiver, or appointment of agent; or
 - iii. Implied jurisdiction:
 1. Minimum contacts:
 - a. Systematic and continuous allow general jurisdiction
 - b. Weak and episodic allow specific jurisdiction – claim must arise from contacts
 2. Fairness factors:
 - a. Expectations of parties

- b. Forum non conveniens
- c. Forum state s interest
- d. O ther states interest

III. The Constitution and Choice of Law

- a. Limits on legislative authority
- b. Due Process
 - i. State must have enough contacts that application of its law is not unfair surprise
 - ii. Cannot apply choice of law rules in a way that would violate due process (*Home Ins. Co. v. Dick* – p. 304)
- c. Full Faith and Credit
 - i. No general duty to recognize foreign law
 - ii. Should only refuse to apply law of another state in exceptional circumstances (*Loucks* – p. 69)
 - iii. M ust recognize another state s law providing a substantive defence, even if doing so is contrary to forum s public policy , when forum s interest is casual and other state s law w ould be gravely impaired (*Bradford v. Clapper* – p. 311)
 - iv. Unless another state has superior interest, forum state may enforce its own laws without violating full faith and credit (*Alaska Packers* – p. 313)
 - v. *Allstate v. Hague* (p. 324): application of state law does not violate full faith and credit or due process when state has significant aggregate contacts with parties and occurrence
 - vi. Original forum may always apply its own statute of limitations (*Sun Oil*, p. 341)
- d. Obligation to Provide a Forum
 - i. *Hughes v. Fetter* (p. 342): statutory policy excluding another state s cause of action v iolates fu ll faith and cred it without some reasonable basis
 - ii. *Broderick v. Rosner* (p. 345): application of forum procedural rules to effectively bar another state s cause of action v iolates fu ll faith and credit
 - iii. *Tennessee Coal* (p. 349): giving full faith and credit to a foreign state s law , containing a provision limiting jurisdiction to courts of the foreign state, requires that a court refuse to apply the provision
- e. Discrimination in Choice of Law
 - i. Privileges and immunities clause forbids discrimination concerning fundamental rights against residents of other states (*Piper* – p. 353)

IV. Recognition and Enforcement of Foreign Judgements and Arbitration

- a. United States
 - i. Res Judicata
 - 1. Claim Preclusion – bars later suits with the same cause of action or based on the same facts (merger and bar)

2. Issue Preclusion – bars re-litigating a previous issue when:
 - a. Issue was actually litigated;
 - b. Parties had sufficient incentive to litigate; and
 - c. Issue was determined by the tribunal and necessary for the tribunal's decision
 - d. Applies to litigation involving other parties
 3. State Law Preclusion – state judgements may have issue or claim preclusive effect on exclusively federal claims, and the subject matter jurisdiction exception to full faith and credit does not apply to such judgements as long as the state court had jurisdiction to issue the judgement (*Matsushita v. Epstein* – p. 531)
- ii. Full Faith and Credit
1. “The judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such a State, and none others, could be pleaded in any other court of the United States”
 2. Judgement in a wrongly-decided case is still entitled to full faith and credit (*Fauntleroy v. Lum* – p. 454)
 3. Must give judgement from another state exactly the same preclusive effect it would have in the state it was entered, and forum state may not modify a judgement from state where such judgements unalterable (*Yarborough* – p. 458)
 4. *Thomas v. Washington Gas* (p. 468) – no full faith and credit res judicata effect for state commission award where state commission only had jurisdiction to resolve plaintiff's rights under state law; subsequent proceeding would not conflict with state's interest
- iii. Limitations on Full Faith and Credit
1. *Durfee v. Duke* (p. 479): issue preclusion can bar litigation of jurisdiction in later proceeding, even if earlier court did not actually have jurisdiction
 2. If two judgements are inconsistent, the later judgement is res judicata in a subsequent proceeding
 3. *Clarke v. Clarke* (p. 486): full faith and credit is not required for decree from another state purporting to transfer title to property where the other state does not have jurisdiction over the property, for example real property located in the forum state
 4. *Worthley v. Worthley* (p. 497): full faith and credit does not require enforcement of retroactively and prospectively modifiable decrees from another state

5. *Baker v. GM* (p. 504): full faith and credit does not allow state to prevent witness from testifying under subpoena issued by another state in cases outside its governance
 6. States may apply their own enforcement procedures, for example statute of limitations, but if reviving another state's judgment would have the effect of creating a new judgment, then forum state must also treat it as a new judgment for the purposes of the statute of limitations on enforcement of judgements, even if revival would have been impossible in forum state
- iv. Defence of Marriage Act
1. Does not forbid a state from recognizing gay marriages between its own residents
 2. Does not forbid a state from recognizing gay marriages between the residents of other states
 3. Provides an exception to the Full Faith and Credit Clause to allow states not to recognize other states' gay marriages
 4. Within congressional power to regulate full faith and credit
- b. Other Countries
- i. Judgements
1. Full faith and credit does not apply to judgements from other countries
 2. Enforcement under customary law is based upon comity
 3. For its judgements to be enforceable, foreign court must be competent, have jurisdiction, respect basic due process, and have a system of jurisprudence likely to secure an impartial administration of justice between foreigners and citizens
 4. No enforcement when there is proof of prejudice in foreign court or legal system, or intentional fraud on the court
 5. *Hilton v. Guyot* (p. 817)
 - a. Foreign proceeding not required to meet American due process standards
 - b. Comity requires reciprocity – the foreign court must be willing to enforce the judgement were the situation reversed – and so without reciprocity a foreign judgement will not be enforced
 6. *Hunt v. BP*
 - a. Reciprocity not required for recognition of a foreign judgement
 - b. Foreign final judgements that are enforceable in the United States have preclusive effect as res judicata
 7. Foreign judgements will generally be enforced if the court is satisfied that all parties have been accorded due process
 8. State law governs recognition and enforcement
 9. Treaties or conventions for enforcement of judgements
- ii. Arbitration

1. For a court to stay its proceeding for arbitration or compel arbitration:
 - a. Parties must have agreed to arbitration
 - b. Subject matter must be arbitrable
 - i. Viewed in light of general federal policy preferring arbitration, with any doubts resolved in favour of arbitration
 - ii. *Fuller v. Guthrie*: where subject matter of claim was not foreseen by parties, claim is not arbitrable
2. *Mitsubishi v. Soler*
 - a. Antitrust claims under American law found arbitrable by foreign arbitration panel, even though antitrust is not arbitrable in the United States
 - b. American court could refuse to enforce arbitration award on public policy grounds if arbitrator refused to consider claims raised under American law
 - c. Antitrust enforcement implicates public policy
 - d. Similar principle for securities law (*Wilke*)
3. New York Convention
 - a. Signatories must recognise valid written arbitration agreements
 - b. Signatories must recognise arbitration awards as binding and enforce awards according to procedures of the state where the award was issued
 - c. United States Reservation stating that enforcement must be based on reciprocity
 - d. Party opposing enforcement has the burden
 - e. Limits permissible defences against enforcement:
 - i. Agreement fails under law
 - ii. Notice insufficient to defend
 - iii. Dispute outside subject matter of arbitration
 - iv. Bad arbitration procedure
 - v. Arbitration not final or binding
 - vi. Subject matter is non-arbitrable
 - vii. Enforcement contrary to public policy
 1. Violates *forum state* most basic notions of morality and justice
4. *Libyan Sun Oil*: arbitration award enforced even though it was contrary to foreign policy, because public policy and foreign policy are not the same, and enforcement of breach of contract award is not against general public policy

V. International Conflicts

a. Bases of Jurisdiction

i. Territoriality

1. State has absolute, although not necessarily exclusive, right to regulate conduct within its borders
2. Subjective territoriality
 - a. Subject of activity occurs in state asserting jurisdiction, for example conspiracy partially performed in state but completed in another state
 - b. Not part of customary international law
3. Objective territoriality
 - a. Effect or result of activity occurs in state asserting jurisdiction, for example crimes planned or completed in state or that produce serious harm to social or economic order within state
 - b. Not part of customary international law
 - c. Adopted by American federal courts, where effects of conduct inside the United States were so reprehensible that jurisdiction is appropriate (Effects Doctrine)

ii. Nationality

1. State may regulate conduct of its nationals anywhere
2. States determine who its nationals are, but claim of nationality must be based on genuine link between the state and the person the state is asserting jurisdiction over

iii. Protective Principle

1. State may exercise jurisdiction over acts against its:
 - a. Security and integrity
 - b. Vital economic interests

iv. Passive Personality

1. State may exercise jurisdiction over acts that injure its nationals
2. Injuries to state's nationals seen as injuring the state
3. Generally not accepted for torts or small-scale crimes

v. Universal Jurisdiction

1. State may exercise jurisdiction over acts that are universally dangerous to states and their nationals, or against peremptory norms of international law
2. Conduct is a crime against all members of the international community, so any states may punish

b. Must have congressional intent for extraterritorial application of statute

- i. Look to language and nature of statute
- c. Cannot exercise jurisdiction where doing so would be unreasonable