

C. Choice of Law Applicable to Contracts

Central features of all choice of law systems are rules governing the choice of law applicable to contracts. This was a principal focus of Huber's *De Conflictu Legum* and Story's *Commentaries on the Conflict of Laws*, as well as of the *First* and *Second Restatements*.¹⁸⁴ As with the law applicable to torts, U.S. choice of law rules concerning contracts have undergone substantial evolution in the past century, and remain subject to diverse approaches in different U.S. courts. Indeed, it is often said that the choice of law applicable to contracts is "the most complex and confused area of choice-of-law problems."¹⁸⁵ Because of the continuing relevance of traditional rules in many jurisdictions, this section devotes particular emphasis to historic rules and developments.

1. Party Autonomy and Choice of Law Clauses¹⁸⁶

It is common for commercial contracts to include "choice of law" provisions that select the law that the parties agree should govern their disputes. Like forum selection clauses, private parties agree upon choice of law clauses in order to increase the predictability of their agreements, to avoid the costs of disputes over applicable law, and to obtain advantages by specifying a favorable body of substantive law.¹⁸⁷ Private parties will often prefer that the law of their own home jurisdiction govern their agreements (although this preference is generally unreflective, and may actually result in the application of unfavorable rules of substantive law). If this cannot be bargained for, international commercial agreements often specify the laws of a neutral, third country with a developed legal system (such as England, New York or Switzerland).

When a choice of law clause exists, three significant issues arise: (a) is the agreement enforceable; (b) if so, subject to what exceptions; and (c) how is the agreement to be interpreted? Different nations adopt significantly different approaches to all

184. See J. Story, *Commentaries on the Conflict of Laws* Chapter VIII (2d ed. 1841); *Restatement (First) Conflict of Laws* Chapter 8 (1834); *Restatement (Second) Conflict of Laws* Chapter 8 (1971).

185. R. Weintraub, *Commentary on the Conflict of Laws* 362 (3rd ed. 1986).

186. Commentary on party autonomy and choice of law agreements includes, e.g., Covey & Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection*, 61 *Denver L.J.* 837 (1984); James, *Effects of the Autonomy of the Parties on the Conflicts of Law*, 36 *Kent. L. Rev.* 34 (1959); Prebble, *Choice-of-Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 *Cornell L. Rev.* 433 (1973); Grinson, *Governing Law Clauses in Commercial Agreements — New York's Approach*, 18 *Colum. J. Trans. L.* 323 (1980); James, *Effects of the Autonomy of the Parties on Conflicts of Law*, 36 *Chi. Kent. L. Rev.* 34 (1959); Weinberger, *Party Autonomy and Choice of Law: The Restatement, Second, Interest Analysis and the Search for a Methodological Synthesis*, 4 *Hofstra L. Rev.* 605 (1976); Yntema, *Contract and the Conflict of Laws: "Autonomy" in the Choice of Law in the United States*, 1 *N.Y.L. F.* 46 (1955).

187. "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). See Lowe, *Choice of Law Clauses in International Contracts: A Practical Approach*, 12 *Harv. Int'l L. J.* 1 (1971).

three of these questions; different approaches have prevailed in different historical periods; and different approaches presently prevail in different U.S. jurisdictions.

a. Traditional U.S. Approach: Choice of Law Clauses Are Not Enforceable

During the 19th and early 20th century, private choice of law agreements were sometimes said to be *per se* unenforceable (much like choice of forum and arbitration agreements).¹⁸⁸ The *Restatement (First) Conflict of Laws* contained no provisions regarding choice of law agreements, leaving the question to be governed by generally applicable choice of law rules for contracts (which accorded no weight to the parties' intended choice of law). Joseph Beale, the Reporter for the *First Restatement*, made it clear that he regarded choice of law clauses as unenforceable. Beale characterized the principle of party autonomy in choice of law as "absolutely anomalous," "theoretically indefensible," and "absolutely impracticable."¹⁸⁹ Beale reasoned that enforcement of a choice of law clause would mean that "at their will [private parties] can free themselves from the power of the law which would otherwise apply to their acts."¹⁹⁰

Early U.S. judicial decisions were less doctrinaire and adopted divergent approaches to party autonomy in the choice of law. Some early decisions refused to recognize the concept of party autonomy.¹⁹¹ But other decisions adopted a different approach, either enforcing express choice of law agreements,¹⁹² or inquiring into the substantive law that the parties to a contract likely intended to govern their dealings.¹⁹³

b. Contemporary U.S. Approach: Choice of Law Clauses Are Presumptively Enforceable

Historic skepticism about the enforceability of choice of law agreements has been substantially eroded in contemporary U.S. law. As detailed below, such clauses are now generally enforced by U.S. courts, subject to significant exceptions.¹⁹⁴ The *Restatement (Second) Conflict of Laws* states a widely accepted approach, providing in §187(1) that choice of law clauses will generally be enforced as to subjects that could have been resolved through an express provision in the parties' agreement (such as

188. See *supra* pp. 373-74 & 993-94.

189. 2 J. Beale, *A Treatise on the Conflict of Laws* 1080, 1083, & 1084 (1935).

190. 2 J. Beale, *A Treatise on the Conflict of Laws* 1080 (1935).

191. E.g., *E. Gerli and Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931).

192. *Dolan v. Mutual Reserve Fund Life Ass'n*, 53 N.E. 398 (Mass. 1899); *Griesemer v. Mutual Life Ins. Co. of New York*, 38 P. 1031 (Wash. 1894); *Fonseca v. Cunard SS Co.*, 27 N.E. 665 (Mass. 1891); *Kellogg v. Miller*, 13 Fed. 198 (D. Neb. 1881).

193. *Pritchard v. Norton*, 106 U.S. 124 (1882); *Wayman v. Southard*, 23 U.S. 1, 48 (1825); *Thompson v. Keicham*, 8 Johns. 189 (N.Y. 1811).

194. See *Restatement (Second) Conflict of Laws* §187 (1971); Gruson, *Governing Law Clauses in Commercial Agreements - New York's Approach*, 18 Colum. J. Trans. L. 323, 324 n.3 (1979) (collecting authorities); Gruson, *Governing-Law Clauses in International and Interstate Loan Agreements - New York's Approach*, 1982 U. Ill. Rev. 207.

the time for performance).¹⁹⁵ Although it does not expressly say so, §187(1) contemplates non-enforcement of agreements in violation of forum public policy (because such agreements would not have been capable of resolution in the manner directed by foreign law even by an express agreement).

Section 187(2) permits enforcement of choice of law provisions as to issues that the parties could not have expressly dealt with, subject to exceptions.¹⁹⁶ Section 187(2) applies to matters such as capacity, substantive validity, and formalities. The general rule of enforceability is subject to exceptions where there is "no substantial relationship" between the chosen law and the parties or their transaction,¹⁹⁷ or where the chosen law would be contrary to the fundamental public policy of a state with a "materially greater interest."¹⁹⁸

Most contemporary U.S. state and federal courts have adopted approaches that are broadly similar to §187.¹⁹⁹ The same is true of §1-105(1) of the Uniform Commercial Code.²⁰⁰

c. Public Policy

As in other contexts, there is no clear definition of what constitutes a public policy for purposes overriding a choice of law agreement,²⁰¹ nor of how "strong" a public policy must be before it will override the parties' chosen law.²⁰² Some courts have considered whether the asserted public policy is derived from statutory prohibitions, which are typically deemed to be more reflective of public policy than common law

195. The comments to §187 explain that §187(1) relates to "incorporation by reference and is not a rule of choice of law." In dealing with issues that the parties could have dealt with by explicit agreement, the section contemplates subjects that parties ordinarily "spell out ... in the contract." It extends to "most rules of contract law," which are generally "designed to fill gaps in a contract which the parties could themselves have filled with express provisions." The comment includes within this category "rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance, and to excuse for nonperformance, including questions of frustration and impossibility." "As to all such matters, the forum will apply the provisions of the chosen law." *Restatement (Second) Conflict of Laws* §187 comment c (1971).

196. Section 187(2) applies "when it is sought to have the chosen law determine issues which the parties could not have determined by explicit agreement directed to the particular issue. Examples of such questions are those involving capacity, formalities and substantive validity. A person cannot vest himself with contractual capacity by stating in the contract that he has such capacity." *Restatement (Second) Conflict of Laws* §187 comment d (1971).

197. *Restatement (Second) Conflict of Laws* §187(2)(a) (1971).

198. *Restatement (Second) Conflict of Laws* §187(2)(b) (1971).

199. See Gruson, *Governing Law Clauses in Commercial Agreements — New York's Approach*, 18 *Colum. J. Trans. L.* 323 (1979); Reese, *Power of Parties to Choose Law Governing Their Contract*, 1960 *Proc. Am. Soc. Int'l L.* 49 (1960).

200. Uniform Commercial Code §1-105(1) provides: "when a transaction bears a reasonable relationship to this state and also to another state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties."

201. See *Restatement (Second) Conflict of Laws* §187 comment g (1971).

202. Compare *Restatement (Second) Conflict of Laws* §187(2)(b) (1971) ("fundamental policy") with *Intercontinental Hotels Corp. v. Golden*, 254 N.Y.S.2d 527 (1964) ("inherently vicious, wicked or immoral") with *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110 (1918) ("offend our sense of justice or menace the public welfare").

rules,²⁰³ and if so, whether the statute in question is penal in nature or is specifically applicable in choice of law contexts.²⁰⁴ Public policies that have been found capable of invalidating a choice of law clause have included usury restrictions,²⁰⁵ labor relations rules (including covenants not to compete),²⁰⁶ rules concerning governmental corruption,²⁰⁷ rules concerning set-off,²⁰⁸ rules protecting dealers or franchisees,²⁰⁹ rules regarding indemnification,²¹⁰ and laws protecting insureds.²¹¹

As §187(2) indicates, a public policy will not override the parties' chosen law unless it is the public policy of a state (a) whose law would (but for the choice of law clause) apply to the parties' agreement; and (b) which has a "materially greater interest" than the state whose law has been chosen.²¹² In general, the closer the relationship between the parties' transaction and the forum state, the more likely that local law will be deemed to constitute a substantial public policy.²¹³ As §187(2)(b) of the *Second Restatement* suggests, the public policy of states other than the forum may sometimes render the parties' choice of law clause unenforceable.²¹⁴

d. Reasonable Relationship

Some courts refuse to enforce choice of law provisions that select the law of a state that lacks a "reasonable relation" to the parties' transaction. For example, §1-

203. *Restatement (Second) Conflict of Laws* §187 comment g (1971) [by implication].

204. *Reger v. National Assoc. of Bedding Mfrs.*, 372 N.Y.S.2d 97, 116 (1975); *Big Four Mills, Ltd. v. Commercial Credit Co.*, 211 S.W.2d 831, 836 (Ky. 1948); *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 65 F.R.D. 624, 632 (D. Nev. 1974), *rev'd on other grounds*, 533 F.2d 486 (9th Cir. 1976), *cert. denied*, 429 U.S. 887 (1976).

205. *E.g., Whitaker v. Spiegel, Inc.*, 623 P.2d 1147 (Wash. 1981). The clear weight of authority is that usury restrictions are not sufficiently clear and fundamental to constitute fundamental public policies for choice-of-law purposes. *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); *Clarkson v. Finance Co.*, 328 F.2d 404 (4th Cir. 1964); *Garner v. duPont Glare Forgan, Inc.*, 135 Cal. Rptr. 230 (1976).

206. *De Santis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990); *Cherry, Bekwert & Holland v. Brown*, 582 So.2d 502 (Ala. 1991); *Davis v. Jointless Fire Brick Co.*, 300 F.2d 1 (9th Cir. 1924); *Blalock v. Perfect Subscription Co.*, 458 F.Supp. 123 (S.D. Ala. 1978).

207. *Triad Financial Establishment v. Tumpene Co.*, 611 F.Supp. 157 (N.D.N.Y. 1985).

208. *Moore v. Subaru of America*, 891 F.2d 1445 (10th Cir. 1989).

209. *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*, 858 F.2d 1339 (8th Cir. 1988); *Bush v. National School Studios, Inc.*, 407 N.W.2d 883 (Wis. 1987); *Rutter v. EX of Tri-Cities, Inc.*, 806 P.2d 1266 (Wash. Ct. App. 1991).

210. *Tucker v. R.A. Hanson Co.*, 956 F.2d 215 (10th Cir. 1992); *Donaldson v. Fluor Engineers, Inc.*, 523 N.E.2d 117 (Ill. App. 1st Dist. 1988); *Chrysler Corp. v. Skyline Indus. Services, Inc.*, 502 N.W.2d 715 (Mich. App. 1993) (refusal by Michigan court to enforce contractual indemnification provision that violated laws of Illinois, which was place of relevant conduct, notwithstanding Michigan choice of law clause).

211. *New York Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900); *Nelson v. Aetna Life Ins. Co.*, 359 F.Supp. 271, 290-2 (W.D. Mo. 1973).

212. *Restatement (Second) Conflict of Laws* §187(2)(b) (1971).

213. *Restatement (Second) Conflict of Laws* §187 comment f (1971) ("The more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision").

214. *Connecticut General Life Ins. Co. v. Boseman*, 84 F.2d 701, 705 (5th Cir. 1936), *aff'd*, 301 U.S. 196 (1937); *Citizens National Bank v. Waugh*, 78 F.2d 325, 327 (4th Cir. 1935); *Pricke v. Esbrandtsen Co.*, 151 F.Supp. 465, 468 (S.D.N.Y. 1957).

105(1) of the Uniform Commercial Code provides that "when a transaction bears a reasonable relationship to this state and also to another state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties." Section 187(2)(a) is to the same effect.

The principal rationale for this requirement appears to be a concern that parties to purely local transactions, relating entirely to one state, not be able to circumvent local laws by choosing a foreign law.²¹⁵ Nonetheless, the reasonable relationship requirement is stated *more* broadly, suggesting that it is applicable to transactions involving relationships with two or more jurisdictions.²¹⁶

e. Interpretation of Choice of Law Clauses

Like other contractual provisions, choice of law clauses must be interpreted. This usually turns primarily on the language that the parties used in their agreement. Nevertheless, there are recurrent issues of interpretation, as to which rules of construction have developed.

First, the parties' agreement to a choice-of-forum clause does not necessarily imply agreement that the chosen forum's law should also govern their relations.²¹⁷ Conversely, an agreement as to governing law does not, under due process precedents, necessarily provide a submission to the jurisdiction of the courts of the chosen state.²¹⁸

Second, like choice of forum clauses, choice of law agreements often must be construed to determine their scope — the issues or claims that are subject to the parties' chosen law. As with forum selection agreements, this inquiry turns largely on the particular language of the parties' agreement. Some choice of law clauses state only that "[t]his agreement shall be construed in accordance with the laws of State A," which suggests that issues of capacity, contractual validity, formalities, excuses, and damages are not subject to the parties' chosen law. Other choice of law clauses

215. *Dolan v. Mutual Reserve Fund Life Ass'n*, 53 N.E. 398, 399 (Mass. 1899); *New England Mutual Life Ins. Co. v. Olin*, 114 F.2d 131, 136 (7th Cir. 1940).

216. *Restatement (Second) Conflict of Laws* §187(2)(a) (1971); Uniform Commercial Code §1-105 (1); *Sneeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); *Consolidated Jewellers, Inc. v. Standard Financial Corp.*, 325 F.2d 31, 34 (6th Cir. 1963); *Proves v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993). For criticism of the reasonable relationship requirement, see A. Ehrenzweig, *Conflict of Laws* 469 (1962).

217. *Grisson, Governing-Law Clauses in International and Interstate Loan Agreements — New York's Approach*, 1982 U. Ill. Rev. 207. However, the parties' submission to the jurisdiction of a particular forum can be evidence of an implied selection of applicable law. E.g., *Restatement (Second) Conflict of Laws* §187 comment a (1971); *Lummas v. Commonwealth Oil Refining Co.*, 280 F.2d 915 (1st Cir. 1960), cert. denied, 364 U.S. 911 (1960); *Kress Corp. v. Levy Co.*, 430 N.E.2d 593 (Ill. 1981). See also *Paper Express Ltd. v. Pfankuch Maschinen GmbH*, 1990 WL 141424 (N.D. Ill. Sept. 24, 1990) (acceptance of rules of German trade association included acceptance of jurisdiction of German courts); *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 756 F.Supp. 136 (S.D.N.Y. 1991) (court rejects argument that Bolivian law would have required parties to include forum selection clause in contract, if it had been executed).

218. See *supra* pp. 101-02. It may, however, constitute a significant factor in minimum contacts analysis. See *supra* pp. 148-49.

state more broadly that "[t]his agreement shall be governed by the laws of State B," or "[t]his agreement and all disputes arising under it shall be subject to the laws of State C." Both formulations suggest that *all* issues of contract law are subject to the parties' chosen law, but that tort or other non-contractual claims that relate to the contract are not.²¹⁹ Finally, some choice of law clauses are drafted very broadly, attempting to include non-contractual claims (as well as contractual ones): "all disputes arising out of or relating to this agreement shall be governed exclusively by the laws of State D."

Third, choice of law clauses must be interpreted to determine which aspects of the parties' chosen law are applicable. In particular, does a reference to "the laws of State E" refer to the "whole law" of State E — including its choice of law rules — or does it refer only to the "local law" of State E? The *Second Restatement* provides that, absent contrary evidence of intent, the latter interpretation will prevail.²²⁰

Fourth, will a choice of law clause be interpreted to include issues relating to procedure, statutes of limitations, burdens of proof, excuses for non-performance, or damages?²²¹ The *Second Restatement* suggests that at least some of these issues will generally *not* be subject to the parties' chosen law, although evidence of contrary intent could produce a different construction.²²²

f. Selected Materials on Party Autonomy

Excerpted below are selected materials on choice of law agreements. First, consider §§187 and 204 of the *Restatement (Second) Conflict of Laws*, which adopt a general rule of enforceability for choice of law clauses as to specified issues. Then reread the excerpts from *The Bremen v. Zapata Off-Shore Co.*, *Roby v. Corporation of Lloyds*, and *Triad Financial Establishment v. Tumpene Co.*

RESTATEMENT (SECOND) CONFLICT OF LAWS (1971)

§§187 & 204

§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.

(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

219. E.g., *T-Bill Option Club v. Brown & Co.*, 1994 WL 201104 (7th Cir. 1994); *Pollite v. McDonald's Corp.*, 1994 U.S. App. Lexis 1506 (10th Cir. 1994); *Union Oil Co. v. John Brown E & C*, 1994 WL 535108 (N.D. Ill. 1994).

220. *Restatement (Second) Conflict of Laws* §187(3) (1971); *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955); *Fuller Co. v. Compagnie des Basucites de Guinée*, 421 F.Supp. 938, 946 (W.D. Pa. 1976); *infra* pp. 663-64.

221. *Restatement (Second) Conflict of Laws* §§122-43 (1971).

222. See *infra* pp. 663-64.

(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 [general choice-of-law] rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

§204. When the meaning which the parties intended to convey by words used in a contract cannot satisfactorily be ascertained, the words will be construed

(a) in accordance with the local law of the state chosen by the parties, or

(b) in the absence of such a choice, in accordance with the local law of the state selected by application of the rule of §188.

Comment a. Scope of section. The rule of this Section is applicable only in a limited number of situations. The forum will first seek to interpret the contract in the manner intended by the parties. It will consider the ordinary meaning of the words, the context in which they appear in the instrument, and any other evidence which casts light on the parties' intentions, including an intention, if any, to give a word the meaning given it in the local law of another state. The forum will apply its own rules in determining the relevancy of evidence, and it will use its own judgment in drawing conclusions from the facts. This process, which is called interpretation in the Restatement of this Subject (see §224), does not involve application by the forum of its choice-of-law rules. When the meaning which the parties intended to convey by words used in a contract cannot satisfactorily be ascertained, the forum must determine the meaning of these words by a process which in the Restatement of this Subject is called construction (see §224). This process involves the application of the rules of construction of a particular state. Consequently, a choice-of-law problem arises whenever a contract has a substantial relationship to two or more states with different rules of construction.

THE BREMEN v. ZAPATA OFF-SHORE COMPANY

407 U.S. 1 (1972) [excerpted above at pp. 383-88]

ROBY v. CORPORATION OF LLOYD'S

996 F.2d 1353 (2d Cir. 1993) [excerpted above at pp. 418-23]

TRIAD FINANCIAL ESTABLISHMENT v. TUMPANE CO.

611 F.Supp. 157 (N.D.N.Y. 1985) [excerpted above at pp. 423-26]

Notes on Second Restatement, Bremen, Roby, and Tumpacz

1. *Distinction between interpretation, construction, and validity.* Comment a to §204 draws distinctions between: (a) interpreting a contract; (b) construing a contract; and (c) validity of a contract.

(a) *Interpretation of contract not subject to choice of law analysis.* When a court interprets a contract, it simply looks to the parties' likely intentions. According to the *Second Restatement*, this is not a process requiring the application of legal rules (other than evidentiary rules, which are provided by the forum's procedural law), or the application of choice of law rules. It is merely a process of attempting to ascertain what the parties intended.

(b) *Construction of contract subject to §§187 and 188.* Section 204 distinguishes rules of construction from mere interpretation. If a court cannot satisfactorily ascertain the meaning of a contract by interpreting it, then it must apply the rules of construction of a particular state. Section 204 requires application of the same basic choice of law rules as those provided for in §§187 and 188 for determining the rights and duties of parties to a contract. Is this a sensible approach? Aren't rules of construction merely ways of ascertaining the parties' intent? Why shouldn't the forum apply its own, familiar rules to this delicate task?

(c) *Validity of contract subject to §§187 and 188.* The validity of a contract, as well as issues relating to capacity, performance, and the existence and extent of contractual duties, are issues of law governed principally by §§187 and 188. There was once doubt that the parties could agree upon the law governing the issue of validity, see *Siogelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955) ("much doubt"). This doubt has been largely dispelled. *A.S. Rampell, Inc. v. Hyster Co.*, 765 N.Y.S.2d 475 (1957); Weintraub, *Choice of Law in Contract*, 54 Iowa L. Rev. 399, 407 (1968); *supra* pp. 654-55.

2. *Basis for traditional rule that choice of law clauses are unenforceable.* Why is it that private parties should be permitted to select the law that governs their contractual relations? Consider the following remarks by Joseph Beale:

The fundamental objection ... is that it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract. ... The meaning of the suggestion, in short, is that since the parties can adopt any foreign law at their pleasure to govern their act, that at their will they can free themselves from the power of the law which would otherwise apply to their acts. So extraordinary a power in the hands of any two individuals is absolutely anomalous. J. Beale, *Treatise on the Conflict of Laws* 1079-80 (1935).

Is that persuasive? Do parties really "legislate" when they agree on the law to govern certain of their relations with one another?

3. *Historic authorities permitting enforcement of choice of law clauses.* Beale did not express the only traditional view regarding the enforceability of choice of law agreements. In *Prinzhard v. Norton*, 106 U.S. 124, 136 (1882), the Supreme Court applied Louisiana law to determine the validity of an indemnity bond that had been executed in New York. Under New York law, the bond would have been invalid, for lack of consideration, but under Louisiana law no consideration was required. The Court applied New York law, invoking the "principle that in every forum a contract is governed by the law with a view to which it is made." Other courts upheld express choice of law clauses. See *supra* pp. 654-55.

4. *Basis for rule that choice of law agreements are enforceable.* What is the rationale for enforcing choice of law agreements? Is Beale not correct in his observation that choice of law agreements are different from other contractual commitments? Consider the following explanation:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. ... An objection sometimes made in the past was that to give the parties this power of choice would be tantamount to making legislators of them. ... This view is now obsolete and, in any event, falls wide of the mark. The forum in each case selects the applicable law by application of its own choice-of-law rules. There is nothing to prevent the forum from employing a choice-of-law rule which provides that, subject to stated exceptions, the law of the state chosen by the parties shall be applied to determine the validity of a contract and the rights created thereby. The law of the state chosen by the parties is applied, not because the parties themselves are legislators, but simply because

this is the result demanded by the choice-of-law rules of the forum. *Restatement (Second) Conflict of Laws* §187 comment e (1971).

Is this persuasive?

5. *Enforceability of choice of law clauses under interest analysis.* How do choice of law clauses fare under Currie's interest analysis? Consider: "[P]arty autonomy squares no better with interest analysis. If, as that methodology asserts, an important goal of choice of law is to assess the impact of competing choices on governmental duties such as paying welfare and regulating insurance rates within the state, it is doubtful that the parties' private expression of the preferences should be given much weight." Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 Am. J. Comp. L. 125, 134 (1994). In fact, most states that have adopted Currie's interest analysis presumptively enforce choice of law clauses. E.g., *Nealloyd Lines BV v. Superior Court*, 834 P.2d 1148 (Calif. 1992); *Comdisco Disaster Recovery Services, Inc. v. Money Mgt Systems, Inc.*, 789 F.Supp. 48 (D. Mass. 1992).

6. *Standards of enforceability of choice of law clauses.* What standard for the enforceability of choice of law clauses is set forth in §187? Other authorities have adopted less clear-cut rules, treating choice of law provisions as one factor in a general "center of gravity" or "grouping of contacts" analysis. E.g., *Haag v. Barnes*, 216 N.Y.S.2d 65 (1961). Compare this approach to some decisions concerning the enforceability of forum selection clauses, which hold that the existence of such a clause is merely one factor in a more generalized forum non conveniens or "reasonableness" analysis. See *supra* pp. 379-80. Which of these standards is wiser?

7. *Defects in formation of choice of law agreement.* Choice of law agreements, like other agreements, can be defective. Reasons include unconscionability, fraud, illegality, mistake, or lack of consideration. *Restatement (Second) Conflict of Laws* §187, comment b (1971) ("A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake"); *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*, 858 F.2d 1339 (8th Cir. 1988). What law should determine whether a choice of law clause is invalid? The *Second Restatement* provides that such issues "will be determined by the forum in accordance with its own legal principles." *Restatement (Second) Conflict of Laws* §187, comment b (1971). Why? Why not apply the parties' chosen law? Or the law of the state with the most significant relationship?

8. *Separability of choice of law agreement.* Should choice of law clauses be regarded as "separable," as with arbitration and forum selection agreements? See *supra* p. 401 & *infra* pp. 996-97 & 1013-16. What would be the consequences of such a result?

9. *Enforceability of contracts where the parties' chosen law invalidates the contract.* Suppose that the parties' choice of law clause selects a substantive law that invalidates the parties' basic contract. Should the parties' chosen law be applied to nullify the parties' contract? The *Second Restatement* answers in the negative;

To do so would defeat the expectations of the parties which it is the purpose of the present rule to protect. The parties can be assumed to have intended that the provisions of the contract would be binding upon them. If the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake. If, however, the chosen law is that of the state of the otherwise applicable law under [generally applicable conflict of laws principles in §188], this law will be applied even when it invalidates the contract. *Restatement (Second) Conflict of Laws* §187 comment e (1971).

Is this persuasive? See *Pisacane v. Italia Societa Per Azione Di Navigazione*, 219 F.Supp. 424 (S.D.N.Y. 1963) (applying chosen Italian law, where Italy was also "center of gravity" of the contract, to invalidate provision in contract); *Atlas Subsidiaries, Inc. v. O & O, Inc.*, 166 So.2d 458 (Fla. Dist. Ct. App. 1964) (applying chosen law, where almost all contacts were with that state, to invalidate contractual interest provisions).

10. *Forum's public policy as ground for denying enforcement of choice of law agreement* — *Bremen*. Section 187(2)(b) provides that a choice of law clause will not be given effect if the chosen law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state." This exception parallels public policy exceptions in other contexts. See *supra* pp. 341-43, 486-88, 624-31 & 974-86. Compare the analysis in *Bremen*, where a forum selection clause was unsuccessfully challenged on the grounds that it would result in application of English substantive law that violated U.S. public policies. Suppose that *Bremen* had involved an English choice of law, rather than a choice of forum, clause. How

would the case have been decided by a U.S. court? under §187(2)? Would English law have been applied to determine the validity of the exculpatory clauses in the towage contract?

11. *Forum's public policy as ground for denying enforcement of choice of law agreements* — *Roby*. Consider the decision in *Roby*, which involved the enforcement of both forum selection and choice of law clauses. Is the court's decision — permitting the exclusion of U.S. securities laws by means of an English choice of law clause — correct?

Do claims under the securities laws raise questions of "public policy"? Why are they different from tort or contract claims? Would *Roby* have been decided the same way if it had only involved a choice of law clause (and not a choice of forum agreement)? Note the language excerpted above from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), indicating that the Court would not enforce "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations." See *supra* pp. 421-22. See also pp. 1018-25.

12. *Forum's public policy as ground for denying enforcement of choice of law agreement* — *hypotheticals*. What sorts of forum public policies should be capable of rendering a choice of foreign law unenforceable? Consider:

In *Bremen*, the accident had occurred within U.S. territorial waters, at the beginning of the oil rig's voyage to the Adriatic Sea.

In an action in U.S. courts, arising out of a U.S. employer's termination of an employment contract, for alleged malfeasance by the employee, the employee brings claims for wrongful termination and libel (based upon the employer's public statements that the employee had engaged in wrongful conduct). The employment contract contains a choice of law clause selecting English law, which would permit recovery on libel claims on significantly more liberal basis than the First Amendment would permit. Assume that the employee works (a) solely in the U.S.; (b) solely in England; (c) partially in both the U.S. and England; and (d) solely in France.

In the foregoing employment dispute, the employee asserts race discrimination claims under Title VII — the federal employment discrimination statute. Assume the same workplaces.

A U.S. company licenses its technology to a French company, in an agreement that selects French law and imposes restrictive conditions on competition by the French company. The conditions violate New York state unfair competition laws and federal antitrust law. In an action in U.S. courts, the French company seeks to invalidate the restrictive conditions under New York and U.S. law. The license territory is: (a) the entire world; (b) Europe; (c) the U.S.; (d) France and New York.

13. *Federalism issues in enforcing choice of law clauses*. What law governs the enforceability of choice of law clauses? As discussed below, the Supreme Court has long held that choice of law rules are generally provided by state law (for *Erie* purposes). See *infra* pp. 681-84. Is there any reason that the enforceability of choice of law agreements would raise different issues? Recall the discussion of *Erie* issues in the context of forum selection agreements. See *supra* pp. 431-53. Is there any basis for a rule of federal common law governing the enforceability of choice of law agreements in international cases? Can choice of law clauses, like forum selection agreements, be regarded as issues of federal procedural law?

In applying the public policy exception, does it matter whether the "forum's" public policy is state or federal in origin? Recall the discussion, *supra* pp. 428-29, of the effect of state public policies on the enforceability of international forum selection agreements.

14. *Conspicuous notice requirements*. Some states require that choice of law provisions be "conspicuous." Consider:

If a contract to which this section applies contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, the provision must be set out in boldfaced print. If the provision is not set out in boldfaced print, the provision is voidable by a party against whom it is sought to be enforced. Tex. Bus. & Comm. Code Ann. §35.53 (Vernon 1987).

Is this provision wise? Is it constitutional? Note that it only applies to the selection of non-Texas law. See

also *Merriman v. Convergent Business Systems, Inc.*, 1993 U.S. Dist. Lexis 10528 (N.D. Fla. 1993) (refusing to apply Texas "conspicuous notice" requirement for choice of law clauses).

15. *Foreign public policy as ground for denying enforcement of choice of law agreement.* Consider the application of §187 in *Tumpane*. Was it appropriate for a U.S. court to decline to enforce the parties' "choice of law" clause? Would the parties not have been aware of the existence, or possible existence, of Saudi regulations, like that invoked by the defendant? Suppose that the parties agreed on New York law to govern their contract, specifically in order to avoid the effect of such Saudi regulations? Why should such choice of law agreements not be enforced?

16. *"Choice of public policy" problems.* Note that both *Bremen* and *Tumpane* involve choice of law analysis, but that the "laws" that are involved are public policies. Why is it, again, that the U.S. public policy against exculpatory clauses was not applied in *Bremen*? Note the Court's emphasis on the place where the accident occurred. Compare this rationale to (a) §145 of the *Second Restatement*; (b) *Currie's* interest analysis; and (c) §187(2)(b)'s choice of law rules. How should the *Bremen* "choice of public policy" analysis have been resolved under each of these more contemporary methods of choice of law analysis? See *Daniel Indus., Inc. v. Barber-Colman Co.*, 1993 U.S. App. Lexis 24248 (9th Cir. 1993) (refusing under §187 to apply California public policy (requiring reciprocity in contractual attorneys' fee provisions) to override parties' Texas choice of law agreement, on grounds that California did not have a "materially greater interest" in the issue).

17. *"Reasonable relationship" requirement as ground for denying enforcement of choice of law agreement.* Some contemporary authorities permit the enforcement of choice of law clauses only if they select a law that has some reasonable relationship to the parties or their transaction. For example, as discussed above, §1-105(1) of the Uniform Commercial Code requires a "reasonable relationship" between the parties' transaction and their chosen law. See *supra* pp. 656-57. Section 187(2)(a) of the *Second Restatement* is similar.

What is the purpose of this "reasonable relationship" requirement? Why should parties not be free to subject their agreement to whatever law they think best suits their purposes? Note that London was selected as the contractual forum in *Bremen* precisely because it was neutral — not associated with either party or any aspect of the transaction. Also as in *Bremen*, parties frequently agree to a similarly "neutral" governing law; they often choose a jurisdiction with developed commercial laws (like England, Switzerland, or New York). Should such choices be invalid because they lack a reasonable relationship to the parties' agreement? Consider:

The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed. For only in this way can they be sure of knowing accurately the extent of their rights and duties under the contract.

Restatement (Second) Conflict of Laws §187 comment f (1971). Is this persuasive? What choice of law clauses does this rationale protect? Suppose (a) U.S. and Mexican parties doing business in Mexico agree to English law; (b) New York and Florida parties doing business in the U.S. agree to Mexican law; (c) New York parties doing business in New York agree to Swiss law. See *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1994) (refusing to enforce New York choice of law clause under §187 because "Utah is the only state with an interest in the action").

18. *Interpreting choice of law clauses.* Like other contractual agreements, choice of law clauses must be interpreted. For the most part, this is a straightforward question of deciding what the parties meant when they used particular language. A few issues are recurrent, however, and courts appear to follow general approaches to construction.

(a) *Whole law v. substantive law.* Suppose that a choice of law clause chooses the "law of state X." Does that mean that the court should apply the substantive law of state X, or the whole law of state X (including its choice of law rules)? Consider §187(3), which provides that only the "local law" of the state of the chosen law should be applied, at least absent indication of contrary intention. Is that a likely statement of the parties' intent? *Restatement (Second) Conflict of Laws* §187, comment h (1971) ("To apply the 'law' of the chosen state would introduce the uncertainties of choice of law into the proceedings and would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve.").

(b) *Substantive v. procedural law.* Suppose that the parties choose the "law of state X" to govern all disputes arising from their contract. Does that mean that "procedural" or "judicial administration" issues, dealt with by *Second Restatement* §122, are also governed by the law of state X, even if the case is litigated in state Y? Note that §187 only applies to the law chosen by the parties "to govern their contractual rights and duties." Does this include procedural issues—such as burdens of proof, form of pleadings, evidentiary rules, mode of trial, and statutes of limitations? Lower courts have generally held that it does not. *E.g., Lago & Sons Dairy, Inc. v. H.P. Hood, Inc.*, 1994 WL 484306 (D.N.H. 1994) (choice of law clause does not reach statute of limitations); *Bridge Prods. v. Quantum Chem. Corp.*, 1990 U.S. Dist. Lexis 2202 (N.D. Ill. 1990) (same); *Financial Bancorp, Inc. v. Pingree and Dahle, Inc.*, 890 P.2d 14 (Utah Ct. App. 1994) (same, although express choice of law clause could reach statute of limitations); *Fisher v. Rice*, 1994 WL 673525 (S.D.N.Y. 1994); *JRL Components Corp. v. Insul-Reps, Inc.*, 596 N.E.2d 945, 950 (Ind. App. 1992) ("a contract provision that an agreement is to be governed by the law of another state operates only to import the substantive law of that state; the procedural law of the forum state applies to procedural issues"; waiver of arbitration held procedural); *Gambar Enterprises, Inc. v. Kelly Services Inc.*, 418 N.Y.S.2d 818 (1979); *Carolan v. Cotton Lane Holdings, Inc.*, 841 P.2d 198 (Ariz. 1992) (choice of law clauses generally do not reach procedural matters).

(c) *Applicability of choice of law clause to non-contractual claims.* Suppose that the parties agree to a choice of law clause that extends to "all claims relating to this contract," and that one party asserts a tort claim that is intertwined with the contract. Does the choice of law clause reach this claim? Lower courts have generally concluded that there is no *per se* public policy against application of choice of law clauses to noncontractual claims. See *Turtur v. Rothchild Registry Int'l, Inc.*, 26 F.3d 304 (2d Cir. 1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993). Whether or not a choice of law clause reaches a particular tort claim is a matter of interpretation. *Siffy Lube Int'l, Inc. v. Siffy Lube of Penn.*, 848 F.Supp. 569 (E.D. Pa. 1994) ("contractual choice of law provisions ... do not govern tort claims between contracting parties unless the fair import of the provision embraces all aspects of the legal relationship"); *Krieriemer v. Bache Halsey Stuart Shields*, 437 N.Y.S.2d 10 (1980) ("This contract shall be governed by the laws of ... New York" held not applicable to tort claims); *Fustok v. Conticommodity Services, Inc.*, 618 F.Supp. 1082 (S.D.N.Y. 1985) ("This agreement and its enforcement shall be governed by the laws of the State of Illinois" held not applicable to tort claims); *Merriman v. Convergent Business Systems, Inc.*, 1993 U.S. Dist. Lexis 10528 (N.D. Fla. 1993) ("choice of law provisions in contracts generally will not control the applicable law for tort claims between the contracting parties"). It is not clear whether the forum's rule of construction, or those of the parties' chosen law, should apply to construing the scope of a choice of law clause. *Nedlloyd Lines BV v. The Superior Court*, 834 P.2d 1148 (Calif. 1992).

2. Traditional Approach to Choice of Law Governing Contracts in the Absence of Choice of Law Agreement: Territoriality and Vested Rights

As with choice of law rules applicable to torts, traditional approaches to the law applicable to contracts rested on doctrines of territorial sovereignty. Joseph Story, following Huber, emphasized the importance of principles of international law in choosing the law applicable to contracts.²²³ For Story, this meant a strict application of the law of the "place of contracting" to determine the validity of contracts, as well as a number of other contract-related issues. The *Restatement (First) Conflict of Laws* followed this approach, providing generally that the law of the place of contracting applied to most issues relating to the contract (while also providing a sub-rule that selected the law of the place of performance for certain performance-related issues).²²⁴

Nevertheless, to a much lesser extent than with torts, principles of territorial

223. See J. Story, *Commentaries on the Conflict of Laws* (2d ed. 1841).

224. *Restatement (First) Conflict of Laws* §332 (1934).

sovereignty did not consistently generate a single choice of law rule (such as the "place of the wrong"). Rather, a number of U.S. courts and other authorities adopted different choice of law rules. These variously looked to the law of the place of contracting,²²⁵ the law of the place of performance,²²⁶ and the law impliedly chosen by the parties.²²⁷

The materials excerpted below illustrate the historical approaches of U.S. courts to the choice of law applicable to contracts. Sections 332 and 358 of the *Restatement (First) Conflict of Laws* set forth the basic "place of contracting" and "place of performance" rules. The classic decision in *Milliken v. Pratt*, taught in most conflict of laws courses, applied the place of contracting test. The decision in *Louis-Dreyfus v. Paterson Steamship, Ltd.*, illustrates the "place of performance" test.

RESTATEMENT (FIRST) CONFLICT OF LAWS (1934)

§§332 & 358

§332. The law of the place of contracting determines the validity and effect of a promise with respect to

- (a) capacity to make the contract;
- (b) the necessary form, if any, in which the promise must be made;
- (c) the mutual assent or consideration, if any, required to make a promise binding;
- (d) any other requirements for making a promise binding;
- (e) fraud, illegality, or any other circumstances which make a promise void or voidable;
- (f) except as stated in §358, the nature and extent of the duty for the performance of which a party becomes bound;
- (g) the time when and the place where the promise is by its terms to be performed;
- (h) the absolute or conditional character of the promise.

§358. The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance with respect to:

- (a) the manner of performance;
- (b) the time and locality of performance;
- (c) the person or persons by whom or to whom performance shall be made or rendered;
- (d) the sufficiency of performance;
- (e) excuse for non-performance.

225. *Restatement (First) Conflict of Laws* §332 (1934) ("The law of the place of contracting determines the validity and effect of a promise. ...").

226. *Prichard v. Norton*, 106 U.S. 124 (1882); *Restatement (First) Conflict of Laws* §358 (1934).

227. *Prichard v. Norton*, 106 U.S. 124 (1882); *supra* pp. 653-55.

MILLIKEN v. PRATT*125 Mass. 374 (1878)*

The plaintiffs are partners doing business in Portland, Maine, under the firm name of Deering, Milliken & Co. The defendant is and has been since 1850, the wife of Daniel Pratt, and both have always resided in Massachusetts. In 1870, Daniel, who was then doing business in Massachusetts, applied to the plaintiffs at Portland for credit, and they required of him, as a condition of granting the same, a guaranty from the defendant to the amount of five hundred dollars, and accordingly he procured from his wife the following instrument:

Portland, January 29, 1870. In consideration of one dollar paid by Deering, Milliken & Co., receipt of which is here by acknowledged, I guarantee the payment to them by Daniel Pratt of the sum of five hundred dollars, from time to time as he may want — this to be continuing guaranty. Sarah A. Pratt.

This instrument was executed by the defendant two or three days after its date, at her home in Massachusetts, and there delivered by her to her husband, who sent it by mail from Massachusetts to the plaintiffs in Portland; and the plaintiffs received it from the post office in Portland early in February, 1870.

The plaintiffs subsequently sold and delivered goods to Daniel from time to time until October 7, 1871, and charged the same to him, and, if competent, it may be taken to be true, that in so doing they relied upon the guaranty. Between February, 1870, and September 1, 1871, they sold and delivered goods to him on credit to an amount largely exceeding \$500, which were fully settled and paid for by him. This action is brought for goods sold from September 1, 1871, to October 7, 1871, inclusive, amounting to \$860.12, upon which he paid \$300, leaving a balance due of \$560.12. The one dollar mentioned in the guaranty was not paid, and the only consideration moving to the defendant therefor was the giving of credit by the plaintiffs to her husband. Some of the goods were selected personally by Daniel at the plaintiff's store in Portland, others were ordered by letters mailed by Daniel from Massachusetts to the plaintiffs at Portland, and all were sent by the plaintiffs, by express from Portland to Daniel in Massachusetts, who paid all express charges. The parties were cognizant of the facts.

By a statute of Maine, duly enacted and approved in 1866, it is enacted that "the contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole." ... Payment was duly demanded of the defendant before the date of the writ, and was refused by her. The Superior Court ordered judgment for the defendant; and the plaintiffs appealed to this court.

GRAY, C. J. The general rule is that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit

such a contract. Even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a state the laws of which permit it.

If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person, or sends an agent, or writes a letter, across the boundary line between the two states. As was said by Lord Lyndhurst, "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow & Cl. 342, 363. So if a person residing in this state signs and transmits, either by a messenger or through the post office, to a person in another state, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth.

The guaranty, bearing date of Portland, in the State of Maine, was executed by the defendant, a married woman, having her home in this Commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the State of Maine. The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before. It must therefore be treated as made and to be performed in the State of Maine.

The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person. — Since the making of the contract sued on, and before the bringing of this action, the law of this Commonwealth has been changed, so as to enable married women to make such contracts. The question therefore is, whether a contract made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that state to make, and which she could not lawfully make in this Commonwealth, will sustain an action against her in our courts.

It has been often stated by commentators that the law of the domicile, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications; and the opinions of foreign jurists upon the subject the principal of which are collected in the treatises of Mr. Justice Story and of Dr. Francis Wharton on the Conflict of Laws, are

too varying and contradictory to control the general current of the English and American authorities in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicile, be deemed capable of making it. ...

The principal reasons on which continental jurists have maintained that personal laws of the domicile, affecting the status and capacity of all inhabitants of a particular class, bind them wherever they go, appear to have been that each state has the rightful power of regulating the status and condition of its subjects, and, being best acquainted with the circumstances of climate, race, character, manners and customs, can best judge at what age young persons may begin to act for themselves, and whether and how far married women may act independently of their husbands; that laws limiting the capacity of infants or of married women are intended for their protection, and cannot therefore be dispensed with by their agreement; that all civilized states recognize the incapacity of infants and married women; and that a person, dealing with either, ordinarily has notice, by the apparent age or sex, that the person is likely to be of a class whom the laws protect, and is thus put upon inquiry how far, by the law of the domicile of the person, the protection extends.

On the other hand, it is only by the comity of other states that laws can operate beyond the limit of the state that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. ...

It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract. But it is not true at the present day that all civilized states recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect, and in many states they have nearly or quite the same powers as if unmarried. In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings, and, before the bringing of

the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.

LOUIS-DREYFUS v. PATERSON STEAMSHIPS, LTD.

43 F.2d 824 (2d Cir. 1930)

L. HAND, CIRCUIT JUDGE. The libellants at Duluth shipped a parcel of wheat upon two ships of the respondent and received in exchange bills of lading, Duluth to Montreal, "with transshipment at Port Colbourne, Ontario." These contained an exception for "dangers of navigation, fire and collision," but nothing further which is here relevant. The respondent exercised its right of reshipment, unloaded the wheat at Port Colbourne, stored it in an elevator, and reloaded thirty-five thousand bushels in another ship, the *Advance*, belonging to one Webb, chartered by the respondent's agent, the Hall Shipping Company, for that purpose. This ship safely carried her cargo until she reached the entrance to the Cornwall Canal in the St. Lawrence River, where she took the ground, stove in her bottom and sank. The suit is for the resulting damage to the wheat.

The respondent defended on the ground that the strand, not being due to any fault in management, was a danger of navigation. Failing this, it relied upon the Harter Act (46 U.S.C. §§190-195) and the Canadian Water-Carriage of Goods Act (9-10 Edward VII, Chap. 81), which covers among other ships those "carrying goods from any port in Canada to any other port in Canada" (§3). It requires every bill of lading "relating to the carriage of goods from any place in Canada to any place outside Canada" to recite that the shipment is subject to the act (§5), and, like §3 of the Harter Act (46 U.S.C. §192) provides that "if the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship, nor the owner, agent or charterer" shall be liable "for faults or errors in navigation or in the management of the ship" (§6). The respondent tried to prove that the *Advance* was seaworthy, and was therefore within both statutes. ...

We shall assume arguendo that §3 of the Harter Act did not cover the case. ... We pass the point that the bills of lading did not incorporate that statute; §5 only requires such a recital in case of a shipment from a Canadian, to an outside, port, and apparently even in those cases it is only directory. Verbally at least §6 covered the situation; the *Advance* was "transporting goods" "from" a Canadian port, and the respondent was the charterer, as we have said.

The important question is whether we should look to Canadian law at all. Here is a contract of carriage, made in Minnesota without any relevant exceptions, to be performed partly in the United States and partly in Canada; the carrier fails in performing that part of it which is to take place in Canada; he does not safely transport

the grain from the entrance of the canal to Montreal. The law of the place of that performance excuses him for those faults in navigation which have caused the loss. Does that law control? *Liverpool, etc., Co. v. Phoenix Ins. Co.*, 129 U.S. 397, decided that the validity of a provision in a contract of carriage, limiting the carrier's common-law duty, was to be determined by the law of the place where the contract was made, and this is well-settled law, [*Restatement (First) Conflict of Laws* §366 (Tent. Draft No. 4)], even when the parties expressly stipulate that all questions shall be decided according to some foreign law, which would require a different result. *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724. It is of course only an instance of the usual rule that the law of the place where promises are made determines whether they create a contract (*Restatement (First) Conflict of Laws* §353 (Tent. Draft No. 4)); that law alone attaches any legal consequences to acts within its territory.

On the other hand, it is always said that as to matters of performance the law of the place of performance controls, *Andrews v. Pond*, 13 Pet. 65, 78; *Scudder v. Union National Bank*, 92 U.S. 408, though in application the boundaries of this doctrine are not easy to find, as the last two cases cited illustrate very well. An exchange of mutual promises, or whatever other acts may create a contract for future performance, do not put the obligor under any immediate constraint, except so far as the doctrine of anticipatory breach demands. A present obligation arises only in the sense that it is then determined that when the time for performance arrives, his conduct shall not be open to his choice. For the present nothing is required of him; he can commit no fault and incur no liability. When the time comes for him to perform, if he fails, the law requires him to give the equivalent of the neglected performance; that compulsion is the sanction imposed by the state and the measure of the obligation. The default must indeed be at the place of performance, but the promisor need not himself be there, nor may he there have any property to respond. In such cases it is impossible to say that any liability arises under the law of that place where the promisor chanced to be at the time of performance, especially if such a doctrine were extended to all places where he has any property. In the interest of certainty and uniformity there must be some definite place fixed whose law shall control, wherever the suit arises. Whether the place of performance is chosen because of the likelihood that the obligor will be there present at the time of performance, or — what is nearly the same thing — because the agreement presupposes that he shall be, is not important. All we need say here is that the same law which determines what liabilities shall arise upon nonperformance, must determine any excuses for nonperformance, which are no more than exceptions to those liabilities. ...

In the case at bar, the Canadian law says that performance of the contract of carriage, as respects navigation, shall be excused if the owner uses due care to examine his ship and make her fit for her voyage, to man and victual her and the like. The conduct so specified is thus made an excuse for his failure to carry the goods safely to their destination as he has promised to do. That is exactly like any other excuse for such failure; delay is as much a breach as default; payment not specified is no payment; delivery to another, no delivery.

It is indeed possible to say that any excuse for performance is a condition upon the undertaking, written into, and so a part of, the original promise. Courts which have insisted that the parties must be found in some way to have selected foreign law to control their rights, have so reasoned as to the law of the place of performance. We think that the imputation of any such intent is a fiction. It is quite true that civilized law will generally make part of their obligations whatever the parties choose to incorporate into their promises, foreign law like anything else. It is also true that if the parties have specified that performance shall be subject to certain excuses, the law of the place of performance will accept those excuses; that is no more than saying that the contract defined the performance. But the parties cannot select the law which shall control, except as it becomes a term in the agreement, like the by-laws of a private association. When they have said nothing, as here, the local law determines what shall excuse performance *ex proprio vigore*; the parties do nothing about it. An American contract carries with it none of the immunity of the sovereign which created it; Canadian law reaches it and Canadian contracts indifferently. ...

So far as written into the documents the [Harter] Act became a part of the contract, but no further. In no case did it appear that the default in performance took place in the United States, where alone §3 of the Harter Act (46 U.S.C. §192) was in force. Nor would it make any difference though we ourselves enforced the Act outside the United States in cases where it was not incorporated in the shipping documents. Whatever might be thought of that as law, if we did it, it would not affect the propriety of our recognizing the Canadian Act here. Were it not for §3 of our own Harter Act, we might indeed have to consider whether such an excuse for performance would so far answer our ideas of sound policy that we should accept the Canadian statute. But that statute was apparently drafted closely to conform to our own, and we can of course have no compunctions in taking it as the model of those liabilities which we will recognize. For this reason a provision in the bill of lading incorporating the Canadian Act by reference or at large, would not fall under the ban of *Liverpool, etc., Co. v. Phoenix Insurance Co.*, or *The Kensington*, 183 U.S. 263. On the other hand, the bill of lading might have expressly repudiated both the Harter Act and its Canadian progeny, and fixed the liability of the carrier as at common law or even as that of an unconditional insurer. We will not say that either statute would have prevented the enforcement of those stipulations, but this would be because under Canadian law the stipulated performance would then have been so modified that the statute did not excuse it, and because that result did not offend our local policy. When the parties have not so expressed themselves performance and excuses for nonperformance depend upon Canadian law. ...

Notes on First Restatement, Milliken, and Louis-Dreyfus

1. *Basis for place of contracting rule.* What was the rationale for §332's "place of contracting" rule? Consider the following excerpt from Story's *Commentaries*:

Generally speaking, the validity of a contract is to be decided by the law of the place, where it is made. If valid there, it is by the general law of nations, *jure gentium*, held valid every where, by the tacit or implied consent of the parties. The rule is founded, not merely in the convenience,

but in the necessities, of nations; for otherwise, it would be impracticable for them to carry on an extensive intercourse and commerce with each other. The whole systems of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation; and the nation, which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state, like that, in which it now exists among savage tribes, among the barbarous nations of Sumatra... J. Story, *Commentaries on the Conflict of Laws* §242 (2d ed. 1841).

For a more categorical justification of the "place of contracting" rule, see Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 260, 267 (1909) (to "make the law of the place of performance govern the act of contracting is an attempt to give that law extraterritorial effect").

2. Does the "place of contracting" rule provide certainty and predictability? Is it correct, as Story reasoned, that the "place of contracting" rule provides certainty?

(a) *Determining the "place of contracting."* The "place of contracting" rule initially requires identifying the state in which a contract was made — which in turn requires reference to the substantive contract law of the forum (or some other state). *Restatement (First) Conflict of Laws* §311, comment d (1934). Of course, different states will have different substantive rules of contract law; that means that the "place of contracting" rule will produce different results in different forums, because the same course of conduct will result in a contract being formed (or not formed) in different places when different substantive rules of contract law are applied. For example, where negotiations, communications, and conduct occurs in several different states, a contract can easily be found to have been made in each of the different states when different substantive rules of contract law are applied. See Cook, "Contracts" and the Conflict of Laws, 31 Ill. L. Rev. 143, 158-63 (1936).

What defines the "place of contracting"? Consider the definition contained in *First Restatement* §311, comment d, looking to "the place of the principal event, if any, which, under the general law of Contracts, would result in a contract." What definition is used in *Milliken*? Note the court's reliance on the place where the contract "was complete."

(b) *Distinguishing "performance" from "contracting."* The *First Restatement* also provided, in §358, that certain issues of contract would be governed by the place of performance, rather than the place of contracting. This is illustrated by *Louis-Dreyfus*. In particular, the manner, time, sufficiency, and other aspects of performance would generally be governed by the law of the place of performance. Why is this? Note that, whatever its explanation, the sub-rule introduced further uncertainty into the *First Restatement's* approach to contract choice of law. Consider the following excerpt from comment c to *Restatement (First) Conflict of Laws* §332 (1934):

A difficult problem is presented in deciding whether a question in a dispute concerning a contract is one involving the creation of an obligation or performance thereof. There is no distinction based on logic alone between determining the creation of the contract and the rights and duties thereunder on the one hand, and its performance on the other. ... The point at which initiation ceases and performance begins is not a point which can be fixed by any rule of law of universal application in all cases. Like all questions of degree, the solution must depend upon the circumstances of each case and must be governed by the exercise of judgment.

Did the issue in *Louis Dreyfus* concern performance (under §358) or the validity and effect of the parties' agreement (under §332)? Note §332(f).

3. *Milliken v. Pratt* — application of place of contracting rule. Where was the guaranty contract in *Milliken* signed? Where did *Milliken* say that the guaranty contract was made? Why? Suppose that the case had involved slightly different facts — for example, the seller delivered the goods itself to the buyer in Massachusetts, rather than handing them over to an "express" company. Would that have changed the place of contracting? If so, is the place of contracting rule likely to provide certainty or consistent results?

4. *Milliken v. Pratt* — capacity and validity. *Milliken* refused to apply Massachusetts law of capacity, instead applying Maine law of contractual validity. Why wasn't Massachusetts law applicable? Consider the Court's reply:

It is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts than to

require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote. ...

Is this persuasive? Is it easier to consult the law of a party's place of domicile, or to attempt to ascertain the law of the place of contracting?

Suppose that the laws in *Milliken* were reversed; suppose that Massachusetts law had granted Ms. Pratt the capacity to enter into the guarantee, but that Maine had denied her that power. How would *Milliken* have decided that case? What would a straightforward application of the "place of contracting" test suggest?

5. *Milliken v. Pratt* — *interest analysis*. How would *Milliken* have been decided under Currie's interest analysis? See *supra* p. 649. How would the hypothetical, discussed in the preceding note where Massachusetts and Maine laws were reversed, be decided?

6. *Law governing capacity to contract*. What law should govern a party's capacity to contract?

(a) *Traditional rule*. *First Restatement* §333 provided that "[t]he law of the place of contracting determines the capacity to enter into a contract."

(b) *Contemporary rule*. In contrast, as discussed below, contemporary choice of law rules generally subject issues of capacity to the contracting party's domicile: "The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicile." *Restatement (Second) Conflict of Laws* §198(2) (1971). What is the rationale for §198(2)?

7. The "place of performance" rule. *First Restatement* §358 and *Louis-Dreyfus* provide that a party's performance obligations are governed by the "law of the place of performance," rather than the place of contracting. What is the rationale for the rule that the place of performance governs issues relating to the performance of a contract? Is it based upon concerns about interfering with the territorial sovereignty of the place where performance occurred? Note that most issues relating to performance — such as timing, place, manner, and sufficiency — could readily be resolved by private agreement (and often are). Is a state's territorial sovereignty affected when foreign law fills in gaps of this sort in the parties' agreement? Is the place of performance rule based upon the parties' likely expectations?

8. *Louis Dreyfus* — *choice of law clauses and place of performance rule*. Consider the application of the place of performance rule in *Louis Dreyfus*. Consider how *Louis-Dreyfus* discusses the relationship between choice of law agreements and the "place of performance" rule. Suppose that the parties had agreed that "all questions shall be decided according to" the laws of some place other than Canada. According to *Louis-Dreyfus*, would the parties' chosen law have displaced Canadian law with respect to excuses for non-performance? How would *Second Restatement* §187 resolve the foregoing issue?

Was it likely that the parties expected their performance in Canada to be governed by Canadian law, when they entered into a contract in the United States? Suppose that, contrary to U.S. law, Canadian law had imposed the equivalent of strict liability on the vessel owner: reasonable care would not be a defense to non-performance. Would that affect analysis?

9. *Depeage*. The term depeage refers to the application of different laws to different issues arising with respect to a single contract or tort. *Restatement (Second) Conflict of Laws* §188, comment d (1971). Sections 332 and 358 of the *First Restatement* are a form of depeage. Is this a sensible way to deal with choice of law problems? Is it likely that the parties expect different laws to apply to different aspects of their contractual relations?

3. Contemporary Approach to Choice of Law Governing Contracts in the Absence of Choice of Law Agreement: "Most Significant Relationship"

The *First Restatement's* rules regarding the choice of law applicable to contracts encountered the same sorts of criticism that traditional tort rules met. Indeed, Currie demonstrated the application of interest analysis by means of *Milliken v. Pratt* and hypotheticals derived from married women's contracts.²²⁸

A number of contemporary U.S. authorities have abandoned the "place of con-

228. Currie, *Married Women's Contracts*, 25 U. Chi. L. Rev. 227 (1958).

tracting" rule of the *First Restatement*.²²⁹ A leading example of this trend is the *Second Restatement*, which applies the "most significant relationship" test to contracts. Section 188 of the *Restatement* provides that, in the absence of an effective choice of law by the parties, "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."

Although there has been considerable erosion of the *First Restatement*, there is little consistency or uniformity among contemporary U.S. choice of law decisions involving contracts. That is in part because of "the many different kinds of contracts and of issues involving contracts and ... the many relationships a single contract may have to two or more states."²³⁰ In part, however, it is also because lower courts have simply not been able to agree upon any consistent approach to choice of law issues relating to contract.

A substantial number of lower U.S. courts — approximately 25 — have followed the "most significant relationship" analysis of §188 of the *Restatement Second*.²³¹ Another substantial number of state courts — approximately eleven states — have continued to follow the *First Restatement's* "place of contracting" and "place of performance" standards.²³² A few states have adopted some variation of interest analysis,²³³ while other states appear to be undecided or eclectic in their approach.²³⁴

These analytical differences are sometimes said to conceal a more fundamental consistency of result. Several commentators have remarked that the trend among contemporary lower U.S. courts is to apply that law which will uphold the parties' agreement. "[T]here is a distinct tendency to apply a law that will uphold the contract provided the parties are not of widely disparate bargaining power and the state of the validating law has substantial contacts with the transaction."²³⁵

Consider the following materials, which illustrate some of the contemporary approaches to the choice of law applicable to contracts. The approach of the *Second*

229. See Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches,"* 43 Am. J. Comp. L. 1, 3 (1995) (only 11 states have not abandoned *First Restatement* in contract disputes); Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 Am. J. Comp. L. 599, 606-10 (1994).

230. *Restatement (Second) Conflict of Laws* Chapter 8, Intro. Note (1971).

231. See Symeonides, *Choice of Law in American Courts in 1994: A View "From the Trenches,"* 43 Am. J. Comp. L. 1, 3 (1995) (listing 26 states as following *Restatement Second* in contracts cases).

232. Symeonides, *Choice of Law in American Courts in 1994: A View "From the Trenches,"* 43 Am. J. Comp. L. 1, 3 (1995) (11 states apply *First Restatement* in contracts cases); Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 Am. J. Comp. L. 599, 608-10 (1994).

233. Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 Am. J. Comp. L. 599, 608-10 (1994).

234. Symeonides, *Choice of Law in American Courts in 1994: A View "From the Trenches,"* 43 Am. J. Comp. L. 1, 3 (1995); Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 Am. J. Comp. L. 599, 608-10 (1994).

235. Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 Vand. L. Rev. 717, 737 (1980).

Restatement is set forth in §188 and §206. Also consider *Lilienthal v. Kaufman*, which applies a version of interest analysis.

RESTATEMENT (SECOND) CONFLICT OF LAWS (1971)

§§188 & 206

§188. (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.

(2) In the absence of an effective choice of law by the parties (see §187), the contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(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.

§206. Issues relating to details of performance of a contract are determined by the local law of the place of performance.

LILIENTHAL v. KAUFMAN

395 P.2d 543 (Ore. 1964)

DENECKE, JUSTICE. This is an action to collect two promissory notes. The defense is that the defendant maker has previously been declared a spendthrift by an Oregon court and placed under a guardianship and that the guardian has declared the obligations void. The plaintiff's counter is that the notes were executed and delivered in California, that the law of California does not recognize the disability of a spendthrift and that the Oregon court is bound to apply the law of the place of the making of the contract. The trial court rejected plaintiff's argument and held for the defendant.

This same defendant spendthrift was the prevailing party in our recent decision in *Olshen v. Kaufman*, 385 P.2d 161 (Or. 1963). In that case the spendthrift and the plaintiff, an Oregon resident, had gone into a joint venture to purchase binoculars for resale. For this purpose plaintiff had advanced moneys to the spendthrift. The spendthrift had repaid plaintiff by his personal check for the amount advanced and

for plaintiff's share of the profits of such venture. The check had not been paid because the spendthrift had had insufficient funds in his account. The action was for the unpaid balance of the check. The evidence in that case showed that the plaintiff had been unaware that Kaufman was under a spendthrift guardianship. The guardian testified that he knew Kaufman was engaging in some business and had bank accounts and that he had admonished him to cease these practices; but he could not control the spendthrift.

The statute applicable in that case and in this one is ORS 126.335:

After the appointment of a guardian for the spendthrift, all contracts, except for necessities, and all gifts, sales and transfers of real or personal estate made by such spendthrift thereafter and before the termination of the guardianship are voidable. ...

We held in that case that the voiding of the contract by the guardian precluded recovery by the plaintiff and that the spendthrift and the guardian were not estopped to deny the validity of plaintiff's claim. Plaintiff does not seek to overturn the principle of that decision but contends it has no application because the law of California governs, and under California law the plaintiff's claim is valid.

The facts here are identical to those in *Olshen v. Kaufman*, except for the Californian locale for portions of the transaction. The notes were for the repayment of advances to finance another joint venture to sell binoculars. The plaintiff was unaware that defendant had been declared a spendthrift and placed under guardianship. The guardian, upon demand for payment by the plaintiff declared the notes void. ...

Before entering the choice-of-law area of the general field of conflict of laws, we must determine whether the laws of the states having a connection with the controversy are in conflict. Defendant did not expressly concede that under the law of California the defendant's obligation would be enforceable, but his counsel did state that if this proceeding were in the courts of California, the plaintiff probably would recover. We agree. ...

Defendant contends that the law of California should not be applied in this case by the Oregon court because the invalidity of the contract is a matter of remedy, rather than one of substance. Matters of remedy, procedure, are governed by the law of the forum. What is a matter of substance and what is a matter of procedure are sometimes difficult questions to decide. Stumberg states the distinction as follows: "procedural rules should be classified as those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established." Stumberg, *Principles of Conflict of Laws* 133 (3d ed.). Based upon this conventional statement of the distinction, it is obvious that we are not concerned with a procedural issue, but with a matter of substantive law.

Plaintiff contends that the substantive issue of whether or not an obligation is valid and binding is governed by the law of the place of making, California. This court has repeatedly stated that the law of the place of contract "must govern as to

the validity, interpretation, and construction of the contract." *Jamieson v. Potts*, 105 P. 93, 95 (1910). *Restatement (First) Conflict of Laws* §332, so announced and specifically stated that "capacity to make the contract" was to be determined by the law of the place of contract.

This principle, that *lex loci contractus* must govern, however, has been under heavy attack for years. The strongest criticism has been that the place of making frequently is completely fortuitous and that on occasion the state of making has no interest in the parties to the contract or in the performance of the contract. ... As a result of this long and powerful assault, the principle is no longer a cornerstone of the law of conflicts. There is no need to decide that our previous statements that the law of the place of contract governs were in error. Our purpose is to state that this portion of our decision is not founded upon that principle because of our doubt that it is correct if the only connection of the state whose law would govern is that it was the place of making.

In this case California had more connection with the transaction than being merely the place where the contract was executed. The defendant went to San Francisco to ask the plaintiff, a California resident, for money for the defendant's venture. The money was loaned to defendant in San Francisco, and by terms of the note, it was to be repaid to plaintiff in San Francisco. On these facts, apart from *lex loci contractus*, other accepted principles of conflict of laws lead to the conclusion that the law of California should be applied. ...

There is another conflict principle calling for the application of California law — ... the application of the law which upholds the contract. Ehrenzweig calls it the "Rule of Validation." A. Ehrenzweig, *Conflict of Laws* 353 (1962). ... The "rule" is that, if the contract is valid under the law of any jurisdiction having significant connection with the contract, *i.e.*, place of making, place of performance, etc., the law of that jurisdiction validating the contract will be applied. This would also agree with the intention of the parties, if they had any intentions in this regard. They must have intended their agreement to be valid. ...

Thus far all signs have pointed to applying the law of California and holding the contract enforceable. There is, however, an obstacle to cross before this end can be logically reached. In *Olshen v. Kaufman*, we decided that the law of Oregon, at least as applied to persons applied domiciled in Oregon contracting in Oregon for performance in Oregon, is that spendthrifts' contracts are voidable. Are the choice-of-law principles of conflict of laws so superior that they overcome this principle of Oregon law?

To answer this question we must determine, upon some basis, whether the interests of Oregon are so basic and important that we should not apply California law despite its several intimate connections with the transaction. The traditional method used by this court and most others is framed in the terminology of "public policy." The court decides whether or not the public policy of the forum is so strong that the law of the forum must prevail although another jurisdiction, with different

laws, has more and closer contacts with the transaction. Included in "public policy" we must consider the economic and social interests of Oregon. When these factors are included in a consideration of whether the law of the forum should be applied this traditional approach is very similar to that advocated by many legal scholars. Currie, *Selected Essays on the Conflict of Law* 64-72 (1963). ...

The difficulty in deciding what is the fundamental law forming a cornerstone of the forum's jurisprudence and what is not such fundamental law, thus allowing it to give way to foreign law, is caused by the lack of any even remotely objective standards. ... However, as previously stated, if we include in our search for the public policy of the forum a consideration of the various interests that the forum has in this litigation, we are guided by more definite criteria. In addition to the interests of the forum, we should consider the interests of the other jurisdictions which have some connection with the transaction.

Some of the interests of Oregon in this litigation are set forth in *Olshen v. Kaufman*. The spendthrift's family which is to be protected by the establishment of the guardianship is presumably an Oregon family. The public authority which may be charged with the expense of supporting the spendthrift or his family, if he is permitted to go unrestrained upon his wasteful way, will probably be an Oregon public authority. These, obviously, are interests of some substance. Oregon has other interests and policies regarding this matter which were not necessary to discuss in *Olshen*. As previously stated, Oregon, as well as all other states, has a strong policy favoring the validity and enforceability of contracts. This policy applies whether the contract is made and to be performed in Oregon or elsewhere. The defendant's conduct, — borrowing money with the belief that the repayments of such loan could be avoided — is a species of fraud. Oregon and all other states have a strong policy of protecting innocent persons from fraud. ... It is in Oregon's commercial interest to encourage citizens of other states to conduct business with Oregonians. If Oregonians acquire a reputation for not honoring their agreements, commercial intercourse with Oregonians will be discouraged. If there are Oregon laws, somewhat unique to Oregon, which permit an Oregonian to escape his otherwise binding obligations, persons may well avoid commercial dealing with Oregonians. The substance of these commercial considerations, however, is deflated by the recollection that the Oregon Legislature has determined, despite the weight of these consideration, that a spendthrift's contracts are voidable.

California's most direct interest in this transaction is having its citizen creditor paid. As previously noted, California's policy is that any creditor, in California or otherwise, should be paid even though the debtor is a spendthrift. California probably has another, although more intangible, interest involved. It is presumably to every state's benefit to have the reputation of being a jurisdiction in which contracts can be made and performance be promised with the certain knowledge that such contracts will be enforced. Both of these interests, particularly the former, are also of substance.

We have, then, two jurisdictions, each with several close connections with the

transaction, and each with a substantial interest, which will be served or thwarted, depending upon which law is applied. The interests of neither jurisdiction are clearly more important than those of the other. We are of the opinion that in such a case the public policy of Oregon should prevail and the law of Oregon should be applied; we should apply that choice-of-law rule which will "advance the policies or interests of" Oregon. Courts are instruments of state policy. The Oregon Legislature has adopted a policy to avoid possible hardship to an Oregon family of a spendthrift and to avoid possible expenditure of Oregon public funds which might occur if the spendthrift is required to pay his obligations. In litigation Oregon courts are the appropriate instrument to enforce this policy. The mechanical application of choice-of-law rules would be the only apparent reason for an Oregon court advancing the interests of California over the equally valid interests of Oregon. The present principles of conflict of laws are not favorable to such mechanical application. We hold that the spendthrift law of Oregon is applicable and the plaintiff cannot recover.

GOODWIN, JUSTICE, DISSENTING. ... In the case before us, I believe that the policy of both states, Oregon and California, in favor of enforcing contracts, has been lost sight of in favor of a questionable policy in Oregon which gives special privileges to the rare spendthrift for whom a guardian has been appointed. The majority view in the case at bar strikes me as a step backward toward the balkanization of the law of contracts. *Olshen v. Kaufman* held that there was a policy in this state to help keep spendthrifts out of the almshouse. I can see nothing, however, in Oregon's policy toward spendthrifts that warrants its extension to permit the taking of captives from other states down the road to insolvency. I would enforce the contract.

Notes on Lilienthal and Second Restatement

1. *Criticism of traditional "place of contracting" rule.* Lilienthal rejected the First Restatement's "place of contracting" test. Consider the criticisms of the traditional rule: it can be completely "fortuitous," it ignores the interests of states that are most affected by a transaction, and it gives effect to the law of states with "no interest" in the transaction. Are these persuasive criticisms? Doesn't the "place of contracting" test provide predictability and certainty, at least in most cases? Can't the real interests of other states be dealt with by the public policy exception?

2. *Rules of alternative reference or validation.* A number of contemporary (and some older) authorities have adopted rules of so-called "alternative reference." These rules permit a court to apply whichever of the laws that are potentially applicable to a contract that will uphold the validity of the parties' agreement. E.g., A. Ehrenzweig, *A Treatise on the Conflict of Laws* 466 (1962) ("Parties entering into a contract upon equal terms intend their agreement to be binding, and the law of conflict of laws will give effect to their intent whenever it can do so under any proper law."); R. Weintraub, *Commentary on the Conflict of Laws* 397 (3d ed. 1986); *Cooper v. Cherokee Village Development Co.*, 364 S.W2d 158 (Ark. 1963) (favors "applying the law of the state that will make the contract valid, rather than void"). Lilienthal also cited the "Rule of Validation," although ultimately refusing to apply it. Consider again the result in *Milliken*. Did it involve considerations of this sort? What is the rationale for a rule of validation?

3. *Legitimacy of rules of validation.* Are rules of alternative reference or validation acceptable in an international context? Virtually all nations now recognize private contracts and will enforce them. But most nations also provide basic limits on the validity and enforceability of contracts; those limits serve important public policies such as the protection of individuals from duress or overreaching, and the protection of the public from anticompetitive, corrupt, or otherwise undesirable agreements. Why is it that a U.S. court should refuse to give effect to such public policies — through the mechanism of applying rules of alternative reference? What if the contract in question clearly has closer connections to a foreign state?

Consider the *Triad* case. The New York court there refused to enforce a contract because it was invalid under Saudi law, notwithstanding the fact that it was valid under New York law. Rules of validation would have produced the opposite result. Should a U.S. court ignore Saudi public policy in order to "validate" as many agreements as it can?

4. *Second Restatement's "most significant relationship" test.* Consider the choice of law rule set forth in §188 of the *Second Restatement*. What does "most significant relationship" mean? In truly international transactions, having multiple contacts with several states, how does one select the "most significant" relationship? Note that §188 is an example of depeage, proceeding on an issue by issue basis.

A significant number of state courts have adopted some variation of a "most significant relationship" or "center of gravity" test. See Symeonides, *Choice of Law in American Courts in 1994: A View "From the Trenches,"* 43 Am. J. Comp. L. 1, 3 (1995) (listing 26 states as following *Restatement Second* in contracts cases); *supra* pp. 673-74.

5. *Lilienthal — public policy in choice of law governing contracts.* *Lilienthal* invoked Oregon public policy to prevent application of California law. The court acknowledged the "lack of any even remotely objective standards" for defining public policy. Consider the various Oregon public policies that *Lilienthal* identifies, and the court's ultimate conclusion that Oregon's legislature had incorporated these various policies into a spendthrift law. Is the Oregon spendthrift law appropriately characterized as stating public policy? Why is it that Oregon's public policies invalidating contracts by spendthrifts outweigh other Oregon public policies?

Consider *Lilienthal's* analysis of competing Oregon and California public policies. How can a court meaningfully weigh one state's policies or interests against those of another state? Is it inevitable that courts will be parochially biased in favor of local public policies? Compare the attention that *Lilienthal* devotes to Oregon's public policies to that devoted to California's policies. Note which policy ultimately prevails. Recall the doubts about parochial bias under §403's interest-balancing analysis. See *supra* 592-93.

Compare the *Lilienthal* result to that which would obtain under §332 of the *First Restatement*. See *supra* pp. 664-73.

6. *Lilienthal — application of interest analysis.* The final few paragraphs of *Lilienthal* adopt a form of interest analysis. Indeed, the court ultimately appears to rely on *Currie's* rule that the forum's interests are to be preferred over foreign interests. Consider the wisdom of *Lilienthal's* application of interest analysis. Compare the result in *Lilienthal* to that in *Milliken*; which case is the wiser result? Which case is more likely to promote a predictable and fair commercial environment? How would *Lilienthal* have been decided under the rules of alternative reference set forth above? How would *Lilienthal* have been decided under §188 of the *Second Restatement*? Recall §198(2) of the *Second Restatement* and its rules regarding capacity to contract. See *supra* p. 673.

How would *Currie* have decided *Lilienthal*? Does the case involve a "true conflict"? Would it be possible to adopt a restrained interpretation of Oregon's policies, so as to confine those policies to borrowing within Oregon, thereby revealing a false conflict and permitting application of California's law?

7. *Criticism of Lilienthal's application of interest analysis.* Consider the dissent's remark in *Lilienthal* that the court's decision is "a step backward toward the balkanization of the law of contracts." What is meant by "balkanization"? How does the *Lilienthal* result affect California's interests? How would *Triad* be decided under the *Lilienthal* analysis?

8. *Does Lilienthal violate the Constitution?* Recall contemporary due process and full faith and credit limits on state choice of law decisions. Is the application of Oregon law in *Lilienthal* a violation of these constitutional limits? For an affirmative reply, see E. Scoles & P. Hay, *Conflict of Laws* 101 (2d ed. 1992). Recall also, however, the treatment of capacity under the *Second Restatement*.

9. *Procedure v. substance revisited.* The spendthrift's lawyer in *Lilienthal* argued that the validity of a contract was a matter of "remedy," and therefore a procedural issue subject to the law of the forum. See *supra* p. 676. *Lilienthal* dismissed that suggestion. Was it correct?

10. *Unpredictability in choice of law governing contracts.* Consider the various choice of law rules that are presently available to select the law governing contracts. Consider also the criticisms made of almost every rule, concerning its unpredictability, and the further uncertainties created by escape devices and characterization. All these factors make it extremely difficult, in any truly international case, to predict with confidence the likely law that a U.S. court will apply to a contract dispute. The possibility that foreign courts will apply different (and also unpredictable) choice of law rules makes matters even worse. Is this a satisfactory state of affairs for international businesses? What can be done to improve matters?