

Conflict of Laws

Introduction

Conflicts of laws appear whenever individuals are subject to different laws and jurisdictions. In the Middle Ages, such problems were solved by creating law which applied to all individuals within a certain area (real enactments) and law which 'followed' a certain individual and was applied to this person everywhere (personal enactments).

In the 16. Century, Dutch scholars (especially Ulrich Huber) developed a different approach: (1) The laws of each state have force within the borders of that state; (2) this law applies to all individuals within that state; (3) rights acquired in a certain state retain in force everywhere by the way of comity by the other states.

Why do courts hear cases in which they have to apply foreign law? Why not just sent the parties to a court in the respective jurisdiction? First, in such disputes may be involved residents of the own jurisdiction, and not to hear such a case would violate their right to judicial decision of disputes. Second, the courts hear such cases because this makes it likely that the courts of other jurisdictions will also hear cases of other jurisdictions (comity).

Problems with the application of foreign law could occur because the courts are not familiar with the respective law, there are sometimes language and cultural problems, the foreign law may belong to a totally different system of law, etc.

Theory of ‘Vested Rights’ (1st Restatement)

The notion of territoriality is very important. The forum state will apply the law of the place of the dispute, i.e. the court is going to localize the place of the dispute: it will apply the law of the place where the rights involved are coming from (where e.g. the contract was entered into, or where the injury took place in a tort case). This theory was universally adopted by courts in the U.S. for the first half of the century. Still used in some states.

- “When a right has been created by law, this right itself becomes a fact... A right having been created by the appropriate law, the recognition of its existence should follow everywhere.” (Beale)
- “The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, ..., which like other obligations, follows the person, and may be enforced wherever the person may be found.” (Justice Holmes)
- “The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.” (Restatement)

To find the place where the rights involved have vested, and what law should apply therefore, the court has to determine what kind of rights are involved in the particular case. To do this, it applies a three step test: (1) Characterization – (2) Determination of the rule applicable – (3) Localization of the dispute.

(1) Characterization

The first prong of the three-step test of the Vested Rights Theory is concerned with the characterization of the case. It asks what kind of case it is we are dealing with. If there is one rule for contract cases and another for torts, there must be some way to determine whether the problem before the court is one of contract or tort.

Characterization is a very important step because it determines very much the law that will be applied. Moreover, in this process it is possible to make a lot of different arguments, because the traditional theory has little to say about characterization, there are no specific rules. This opens some holes in the Vested Rights Theory. It seems not as clear a theory anymore as it seemed to be. It is possible to go around the apparently clear rules (with the effect on the predictability of the law!).

The first step in the characterization process is to decide whether the dispute in question concerns an issue of substantive law or procedural law. If the dispute before the court concerns procedural law it is going to apply its own law (law of the forum).

There are several tests possible to be applied to decide that question:

- (1) Does the dispute concern a right or a remedy? Then it's either a question of substantive law or – in case of remedy – a question of procedural law (see pp. 51 note 2). E.g. statutes of limitation would fall under remedy – being a procedural question.
- (2) Outcome determination test: When the issue before the court is going to determine the outcome of the case, then it is a question of substantive law. E.g. statutes of limitation under this test would be substantive law. What if the quantity of the outcome is in question (amount of damages)?
- (3) Purpose test: What is the purpose/reason of the rule in question. Is it a rule how to operate a court? Which would be a procedural rule.

When the court decides that the issue in question concerns substantive law, it has further to decide what kind of case it is; a tort case, a contract case, that is. This part of the characterization process can be broken down into two steps:

- a) primary characterization: which puts a case in a broad area of law (contract, tort, property, etc.).
- b) secondary characterization: which asks what kind of contract case, tort case, property case it is.

(2) Applicable Rule Determination

The court determines the rule applicable to the dispute regarding the concerning area of law.

Tort Cases

The rule for tort cases is to apply the law of the place where the injury took place. (For exceptions see p. 18 note 6.)

Contract Cases

Regarding the rule for contract cases, two different situations have to be considered (for detailed rules, see pp. 20):

- a) in cases concerning the validity of contracts, the law of the place where the contract was made is going to apply (in determining where the contract was made, the forum applies its own law concerning contract formation);

- b) in cases concerning the performance of the contract, the law of the place where the contract is to be performed. If the performance occurs in different states, the law of the state with the most significant relation to the performance has to be applied.

Property Cases

Regarding the rule for property, two different kinds of property have to be considered:

- a) in cases concerning the immovable property (real property), the law of the situs/place of the property is going to apply;
- b) in cases concerning the movable property (personal property), the law of the situs/place of the property at the time of the for the litigation relevant transaction is going to apply. Important exception: in cases concerning a will, the law of the decedent's domicile will apply. The same with movable property in cases regarding the property of spouses.

Marriage Cases

A marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with. The only situations in which the validity of a marriage celebrated elsewhere would be governed by the law of the domicile of either party are: polygamous marriages, incestuous marriages (i.e. marriages which violate the public policy of a state).

Legitimacy of Children Cases

The legitimacy of a child at birth is determined by the law of the state in which the parent whose relationship is in issue is domiciled when the child is born.

Corporation Cases

Many matters affecting corporations (e.g. whether an association has been incorporated, the effect of an unsuccessful 'incorporation', status and rights of shareholders, liability of shareholders, etc.) were referred to the law of the state of incorporation. On the other hand the power of a corporation is subject to limitation by the law of the state in which it seeks to act as well as by the that of the state of incorporation.

Domicile Cases

In some cases the law of the domicile of the parties (or one of the parties) is to be applied. Therefore, it is important to define where somebody's domicile is. Everyone has a domicile, and nobody has more than one. In order to change domicile, a person must establish a dwelling-place with the intention of making it his home. The fact

of physical presence and the intention to remain must occur; if they do so, even for a moment, the change of domicile takes place.

(3) Localization

The court localizes the dispute by application of the rule found in 2.

Escape Devices

Renvoi

Choice of law rules may refer either to a state's 'internal' law or to its 'whole' law – the law that state would apply to the multistate case actually presented, by reference to its own choice of law rules. If the forum state refuses to consider the choice of law rules of the state to which it refers, it is said to 'reject the renvoi'; if it follows the foreign choice of law rule, it is said to 'accept the renvoi'.

If the renvoi is accepted and the state whose choice of law rules are examined refers the case back to the law of the forum state, there is said to be 'remission'; if it refers to a third state, a 'transmission'. Finally, the renvoi is said to be 'partial' if the foreign choice of law rule is found to refer to the internal law of a state and 'total' if the foreign reference is also to the whole law.

The 1934 Restatement generally directed courts to ignore foreign choice of law rules. Two exceptions, however, were to be made: questions of 'title of land' and 'the validity of a decree of divorce' were controlled by the law of the situs of land, or of the domicile of the parties, respectively, 'including the Conflict of Laws rules of that state.'

The modern approaches will apply the renvoi not very often, because the concerns which are addressed by that device are usually already discussed within the modern approaches themselves.

Depeçage

Depeçage means the splitting of a set of facts into different issues. Not likely under the Vested Rights Approach because under this approach the whole set of facts will be evaluated under the area of law which was chosen by the characterization process.

Depeçage will be used under the modern approaches.

Public Policy

The First Restatement did recognize the doctrine of the public policy exception, precluding suits ‘upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.’

‘If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. ... [We] do not close [our] doors, unless help would violate some fundamental principles of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal (e.g. we would not accept a polygamous marriage, but would recognize the legitimacy of a child out of such a marriage). ... There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another.’ [*Loucks v. Standard Oil of NY*]

Some courts, however, do not enforce foreign rights even if they only ‘violate’ the general public policy (i.e. the law of the state whether found in the Constitution, the statutes or judicial records).

Criminal Law/Penal Law/Laws with Punitive Function

The First Restatement provided ... that ‘[n]o action can be maintained to recover a penalty the right to which is given by the law of another state.’ The question is whether it is penal within the rules of private international law. A statute penal in that sense is one that awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong (e.g. punitive damages). A penalty is a sum of money exacted as punishment for a civil wrong as distinguished from compensation for the loss suffered by the injured party.’

Courts always apply their own penal laws (grey area: punitive damages).

Tax Laws

In the First Restatement tax laws (i.e. revenue laws) were mentioned as a type of law that should not be enforced because they furthered a foreign state’s own governmental interests.

But there’s a strong trend to abandon the exception for tax laws.

Pleading and Proving Foreign Law

Common-law courts used to treat foreign law as a question of fact, which has some important consequences: (1) Foreign law must be pleaded like other facts. (2) Foreign

law must be proved in conformity with the law of evidence. (3) The issue as to foreign law is decided by the jury. And (4) there's only very limited appellate review.

Most American courts are authorized to take notice of the law of *sister states* (some can also take notice of the law of *foreign countries*). The party that wants to raise an issue concerning the law of another state has to give notice in its pleadings. Then the court may consider the relevant material or source regarding the foreign law, whether or not submitted by a party or admissible under the rules of evidence. The court (and not the jury) is going to determine the foreign law, which question is subject to review on appeal as a ruling on a question of law.

Even when the foreign state is one of the U.S., determining its law may be difficult. The majority of the states therefore authorize certification of disputed questions to an appropriate court of the other state. Other courts have adopted a presumption that foreign law is identical to that of the forum, unless the contrary is shown. Variants of this approach limit the presumption to 'rudimentary principles of justice' followed in all 'civilized' countries, or to the common law of the forum unmodified by its statutes.

Theory of ‘Most Significant Relationship’ (2nd Restatement)

The forum applies the law of the place which has the most significant relationship to the dispute. This approach takes more factors into account than the 1st Restatement approach. Most widely used tool for resolving choice of law questions.

Generally speaking, this approach contemplates a two-step process in which the court (1) chooses a presumptively applicable law under the appropriate jurisdiction-selecting rule (characterization of the issue!), and (2) tests this choice against the principles of Sec. 6 in light of relevant contacts identified by general provisions like Sec. 145 (torts) and Sec. 188 (contracts).

As for the Vested Rights Approach, one has to go through a number of steps to assess the law applicable: (1) Characterization – (2) Presumption? – (3) Most significant relationship? – (4) Test this choice against the principles of Sec. 6 – (5) Localization.

(1) Characterization

The first step in the characterization process is to decide whether the dispute in question concerns an issue of substantive law or procedural law. If the dispute before the court concerns procedural law it is going to apply its own law (law of the forum).

There are several tests possible to be applied to decide that question:

- (1) Does the dispute concern a right or a remedy? Then it’s either a question of substantive law or – in case of remedy – a question of procedural law (see pp. 51 note 2). E.g. statutes of limitation would fall under remedy – being a procedural question.
- (2) Outcome determination test: When the issue before the court is going to determine the outcome of the case, then it is a question of substantive law. E.g. statutes of limitation under this test would be substantive law. What if the quantity of the outcome is in question (amount of damages)?
- (3) Purpose test: What is the purpose/reason of the rule in question. Is it a rule how to operate a court? Which would be a procedural rule.

When the court decides that the issue in question concerns substantive law, it has further to decide what kind of case it is; a tort case, a contract case, that is. Overall under the Second Restatement Approach, characterization becomes less important because other escape devices are already built into the further test. In addition, a problem can be broken down into different issues to which different laws from different states can be applied (depeceage).

(2a/3) Tort Cases**The General Principle in Tort Cases (Sec. 145)**

- (1) The right and liabilities of parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties and the principles state in Sec. 6.
- (2) Contacts to be taken into account in applying the principles of Sec. 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

Tortious Character of Conduct (Sec. 156)

- (1) The law selected by application of the rule of Sec. 145 determines whether the actor's conduct was tortious.
- (2) The applicable law will usually be the local law of the state where the injury occurred.

Rights of Action for Death

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Sec. 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

(2b/3) Contract Cases**Applicable Law in Contract Cases (Sec. 186)**

Issues in contract are determined by the law chosen by the parties in accordance with the rule of Sec. 187.

Law Governing Contract Issues in Absence of Effective Choice by the Parties (Sec. 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 Sec. 6.

- (2) In the absence of an effective choice of law by the parties (see Sec. 187) the contacts to be taken into account in applying the principles of Sec. 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.

(2c/3) Property Cases

To resolve the question which law is going to be applied one has to distinguish whether (a) real property or (b) personal property is at issue.

- (a) Real property: Presumptively the law of the situs is going to be applied, unless another state has a significant (overwhelming!) interest/relationship in the case (unlikely).
- (b) Personal property: Presumptively the law of the place/situs at the time of the relevant transaction is going to be applied, unless another state has a significant interest/relationship.

Exceptions:

- Intangibles (especially debts): domicile of debtor
- Disposition of property in a will: In case of real property situs of property; in case of personal property place of domicile of descendant
- Allocation of property in divorce cases: joint domicile of spouses

(4) The 2nd Restatement Section 6

Choice of Law Principles (Sec. 6)

- (2) When there is no ... directive [by the law of the forum state], the factors relevant to the choice of the applicable law include
- a) the needs of the interstate and international systems,
 - b) the relevant policies of the forum,
 - c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - d) the protection of justified expectations,
 - e) the basic policies underlying the particular field of law,
 - f) certainty, predictability and uniformity of result, and
 - g) ease in the determination and application of the law to be applied.

(5) Localization

The court localizes the dispute by application of the rule found.

Theory of ‘Governmental Interests’ (B. Currie)

Under this theory the forum applies the law of the state or country which has the most interest in the dispute. Under this approach the court will do the following:

- (1) Is there a statute, with an express choice of law rule**
- (2) The general rule or assumption is that the forum applies its own law**
- (3) Upon request of one (or both) party, the court checks the laws and underlying policies of the involved states.**

Cases will be broken down into the following three categories:

1. False conflicts: Only *one state has really an interest* in a given case => the law of that state will apply.
2. Unprovided for case: *no state has an interest* in the outcome of the case => the law of the forum will apply
3. True conflict: *Two or more states are interested* in the outcome of the case => forum balances its interest against the other state’s interest; if both states have an equal interest, the forum applies its own law, if the other state’s interest is more important, the other state’s law will apply. (In true conflict cases the forum, if possible, usually applies its own law, [which is allowed as long as it has an legitimate interest.]) As a balancing test a forum may use the comparative impairment test: ‘Which state would be hurt more if its law weren’t applied?’

Purpose of a statute/law of a state that could be applied is important; also the public policy of a state.

Theory of 'Better Law'

The forum is going to apply the law which seems to be the best in a certain situation or for the solution of a dispute. It takes into account the following five major choice-influencing considerations (from which the last two are the most important). Courts can only choose between the laws that are brought up by the parties!

A) Predictability of Result

Uniformity of results, regardless of forum, has always been a major goal in choice-of-law theory.

B) Maintenance of Interstate and International Order

Both nations and states within a nation are interested in facilitating the orderly legal control of transactions that in any fashion cross their boundary lines. Smooth conduct of affairs between the people of different nations is essential to modern civilization; the easy movement of persons and things – free social and economic commerce – between states in a federal nation is essential to the very existence of the federation.

No forum whose concern with a set of facts is negligible should claim priority for its law over the law of a state which has a clearly superior concern with the facts; nor should any state's choice of law system be based upon deliberate across the board 'forum preference.'

C) Simplification of the Judicial Task

Courts do not like to do things the hard way if an easier way serves the ends of justice substantially as well. Courts therefore use their own procedural rules. There are, however, some outcome determinative rules, at times classified as procedural, which are so simple that one state's rule can be used as easily as another state's so that the substance-procedure dichotomy is not sensibly applicable to them.

D) Advancement of the Forum's Governmental Interests

If a forum state has a genuine concern with the facts in a given case, a concern discoverable from its strongly social or legal policy, it is reasonable to expect the state's court to act in accordance with that concern. This refers to legitimate concerns, not just to the local occurrence of some facts, or to the local existence of some rule of law that could constitutionally be applied to the facts. A state's governmental interests in the choice of

law sense need not coincide with its rules of local law, especially if the local rules, whether statutory or judge made, are old or out of tune with the times.

E) Application of the Better Law

The better rule of law is the most controversial of the considerations, yet a potent one: Judges know from the beginning between which rules of law, and not just which states, they are choosing.

A judge's natural feeling that his own state's law is better than that of other states to some extent explains forum preference. Of course the local law is sometimes not better, and most judges are perfectly capable of realizing this. The inclination of any reasonable court will be to prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules. The law's legitimate concerns with 'justice in the individual case,' sometimes spoken of as a choice of law objective, and with that 'protection of justified expectations of the parties' which often corresponds with the 'basic rule of validation,' are furthered by deliberate preference of the better rule of law. The preference is objective, not subjective. It has to do with preferred law, not preferred parties.

Statutory Solutions

Foreign Executed Wills

Most American states have statutes that validate wills executed outside the state of administration. “A written will is valid if executed in compliance with [this Code] or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

Uniform Commercial Code

[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

No-Fault Insurance

Many states have adopted ‘no-fault’ insurance plans for automobile accidents. Most states extend coverage to specified persons injured outside the state.

Borrowing statutes

One of the oldest statutory choice of law provisions is the so-called borrowing statute, which directs the forum to dismiss claims under foreign statutes of limitations in appropriate circumstances. ‘When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the law thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall no be maintained in this state.’

‘Tolling Statutes’

Tolling statutes were enacted to ensure that plaintiffs would not be deprived of a reasonable opportunity to sue because a time bar ran while the defendant was beyond the reach of service of process.

Party Autonomy and the Rule of Validation

Party autonomy

Parties agree in advance on a law that would govern a dispute between them arising from the contract. Under the 'Vested Rights' Theory, the courts were reluctant to allow party autonomy. Some courts ignored choice of law provisions in contracts. Others tried to apply the chosen law by using one of the escape devices. The modern approaches are much more permissible.

Second Restatement, Sec. 187:

- (3) 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.
- (4) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
 - (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
 - (b) application of the law chosen by the parties would be contrary to a fundamental policy of a state which has a material greater interest than the chosen state in determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties.

Easy cases: Express choice of law provision in a contract that was bargained for, and the contract has some contacts to the chosen law.

Slightly harder cases: Courts are more reluctant to enforce choice of law provisions in form contracts, adhesion contracts, consumer contracts (although they usually respect the choice of law). Courts also are more reluctant to enforce choice of forum provisions.

Choice of law against public policy: Courts will disregard a choice of law by parties when this choice contravenes the *fundamental public policy* (ordre public) of the forum.

Rule of Validation (Contracts)

There is no a priori reason to conclude that the rule of validation reflects the parties' true intentions better than the choice made explicitly in the contract. But certainly, there are

cases where it makes sense to assume that the parties did not mean to choose an invalidating law. The assumption seems reasonable, e.g., when the ground for holding the agreement unenforceable was apparent when the contract was made, such as failure to comply with proper formalities.

- Court chooses the law that makes a given contract valid (usually some connection necessary);
- not applied in cases where the chosen law was only chosen to circumvent certain provisions in the law of a state (e.g. illegality of agreement);
- a choice of law by parties will usually be respected when it makes the contract valid;
- a court may disregard a choice of law by parties if such choice renders contract invalid (e.g. in case of a mistake by parties).

Constitution and Choice of Law

The Limits of Legislative Jurisdiction

In deciding constitutional choice-of-law questions, whether under the **Due Process** Clause (concerned with fairness to the parties) or the **Full Faith and Credit** Clause (concerned with the relationship between the States), this Court has traditionally examined the *contacts of the State, whose law was applied, with the parties and with the occurrence or transaction* giving rise to the litigation. In order to ensure that the choice of law is *neither arbitrary nor fundamentally unfair* the Court has invalidated the choice of law of a State which has had no significant (minimum) contacts/reasonable relationship, creating *legitimate state interests*, with the parties and the occurrence or transaction.

The Obligation to Provide a Forum

If a forum is not applying its own law to a given case, it cannot refuse to apply the law of another state. Unless the forum is not the appropriate forum at all (forum non convenience).

Unconstitutional Discrimination in Choice of Law (Privileges and Immunity Clause)

1. Does the statute bear on vitality of the nation as a whole (important interest)?
2. Is there a substantial reason why the state treats non-citizens (foreigners) different than citizens?
3. Are the means narrowly tailored and closely related to the reasons/goal to be achieved?

Jurisdiction of Courts

Subject Matter Jurisdiction

Since *State courts have general jurisdiction*, State courts are not restricted in the kind of subjects they may hear and adjudicate.

If on the other hand a case is before a *Federal court*, one of the following two things must be true:

- a. **Diversity**: Either the case is between citizens of different states (with "complete diversity" required, so that no plaintiff is a citizen of the same state as any defendant) and at least \$75,000 is at stake; or
- b. **Federal question**: The case raises a "federal question." Essentially, this means that plaintiff's right to recover stems from the U.S. Constitution, a federal treaty, or an act of Congress. (There is no minimum amount required to be at stake in federal question cases.)

Personal Jurisdiction (in General)

Generally, a state court has jurisdiction over persons *physically present* in the state (at time of service of process); persons with *domicile* in the state; persons that *appear* in court or *consent* to jurisdiction.

Personal jurisdiction in Federal courts depends on the State in which it sits: Federal courts have to apply the State Law regarding jurisdiction (FRCP 4(e)).

Jurisdiction Over Defendants Not Present in the State

If a defendant is not present within the state, the court will first have to assess whether it can exercise jurisdiction over defendant: Most states have "long-arm statutes." A long-arm statute is a statute which permits the court of a state to obtain jurisdiction over persons not physically present within the state at the time of service. ***If a state does not have such a statute, it cannot exercise jurisdiction over persons physically not present in the state.***

Usually one distinguishes two types of jurisdiction: It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising '*specific jurisdiction*' over the defendant. When a State exercises personal jurisdiction over a defendant in a suit not

arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising '*general jurisdiction*' over the defendant.

The reach of the "long-arm statute" has some constitutional Due Process limits. At issue is whether the defendant has had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend '*traditional notions of fair play and substantial justice.*'" (*International Shoe*)

Pennoyer vs. Jeff (p321): Territorial Jurisdiction (where is plaintiff at time of service)

- International Shoe (p324):
1. Minimum contacts
 2. Does not offend traditional notions of fairplay and substantial justice (means enough contacts)
- McGee vs. Intern. Life (p326):
1. Enough Contacts that the state has an interest in the case
 2. Contact so, that the forum is not inconvenient (reasonableness)
- Hanson vs. Beetle (p326):
1. Enough contacts, that the state has an interest in the case
 2. Contact so, that the forum is not inconvenient
 3. Defendant must purposefully avail itself to the benefit of the forum state (must have contacts) (so far only for corporations)
- Worldwide VW (p329):
1. Enough contacts that the state has an interest in the case
 2. Contact so, that the forum is not inconvenient
 3. Defendant must purposefully avail itself to forum state (applies this factor to tort cases too!)
- Asahi (p338):
1. Enough contacts that the state has an interest in case
 2. Contact so, that the forum is not inconvenient
 - 1 and 2 can be balanced (if one is strong the other can be lesser etc)

3. Defendant must purposefully avail itself to forum state
- must be intentionally (knowledge is not enough)

Burger King (p349)

Specific Jurisdiction

The constitutional requirement in cases of specific jurisdiction are:

- (1) Minimum contacts which justify a *state interest*;
- (2) contacts that make the forum a '*reasonable*' *forum* to try that case (convenience); and
- (3) defendant must *avail itself purposefully* of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law.

General Jurisdiction

A State court can exercise general jurisdiction over a defendant when defendant has *continuous and systematic (business) contacts* with a state. (E.g., a single purchase or purchases, even if occurring at regular intervals, are not enough to warrant personal jurisdiction.)

Natural persons

- Domicile;
- residence;
- place of voting;
- drivers license;
- regular activity;
- real estate;
- etc.

Corporations

- Places of business (headquarter);
- place of incorporation;
- presence in a State;
- continuous business relationships;
- soliciting business in a State (aimed advertisement);
- buildings/real estate/factory;
- etc.

Attachment/in rem Jurisdiction

Suits to determine personal obligations were generally 'in personam'. Suits to determine interest in property were said to be 'in rem.' In rem actions were then further divided between 'pure' in rem proceedings, in which the interests of 'the whole world' were adjudicated (e.g., land registration) and 'quasi in rem' proceedings, in which a judgment affected the interests only of particular persons in the property.

Quasi in rem actions were then divided still further into two types: Type 1 actions, in which the object was to settle some dispute over the rights and interests in the property itself; and type 2 actions, in which the dispute was unrelated to the property, which was simply attached for purposes of jurisdiction and to satisfy a judgment against the defendant.

Since type 2 in rem action concerns not really rights in the property but rather jurisdiction over the defendant, it has to satisfy the 'minimum contacts' requirement of the Due Process Clause as well (*Shaffer/International Shoe*).

Transient Jurisdiction

Jurisdiction based on physical presence alone constitutes due process (because it is one of the continuing traditions of the legal system that define the due process standard of 'traditional notions of fair play and substantial justice.')

Limitation on exercise of Jurisdiction:

- Agreement of parties to litigate somewhere else (provided it's reasonable and fair)
- Fraud, Force and Privilege
- Forum non convenienc
- Unreasonable burden on interstate commerce

Recognition of Judgments

General Requirements

A non-rendering state must recognize the judgment of rendering state as a judgment; and the scope of recognition is defined by the res judicata law of the rendering state (that is, it has to treat that judgment the same way that the rendering court would).

1. Foreign judgment is final
2. Foreign judgment is on the merits
3. Proper jurisdiction
4. No defenses:
 - Judgment was not last in time
 - Extrinsic fraud
 - Public policy of forum (very limited)
 - Claim barred by statute of limitation in forum court
 - Judgment on taxes or penal lawErroneous decision of the foreign court is not a defense!

Effect of a Foreign Judgment

In General

Full Faith and Credit Requirement: A non-rendering state has to treat a judgment by the rendering state the same way as the rendering state would. If a judgment is final in the rendering state, the other states have to treat that judgment as a final judgment.

Execution of Another State's Judgments

The execution of judgment is governed by the law of the enforcing state. Formerly, plaintiff had to bring action on the judgment in the second state in order to have a similar judgment issued in this state. Today, most states have passed the Uniform Recognition of Judgments Act which provides that judgments of other states are enforced the same way as judgments of the enforcing state would be (writ of enforcement by county clerk, enforcement assisted by sheriff/marshal).

Res Judicata Effects

A final judgment decided on the merits cannot be relitigated (claim and issue preclusion). If the requirements for full faith and credit have been met, the judgment will be entitled to the same res judicata effects in every other state.

Merger and Bar

When a final judgment is rendered, the plaintiff's cause of action is *merged* into the judgment. Plaintiff may not thereafter maintain another suit on the same cause of action. Where the judgment was rendered in favor of defendant, plaintiff will be *barred* from suing defendant for the same cause of action.

The 'same cause of action' means: (1) same right infringed by the same wrong, (2) same supporting facts, (3) same legal principles applicable.

Collateral Estoppel

Where the cause of action is different in the second proceeding, but an issue resolved in the first litigation is again raised in the second suit, the resolution of the issue/fact in the first suit will be binding on the parties in the second suit.

Requirements: (1) issue must have been actually litigated, (2) the issue must have been essential to the first suit.

Family law

Marriage

If a marriage is valid where celebrated, it is – in general – valid everywhere! A marriage void where celebrated is void everywhere. Only when a marriage 'violates' a state's strong public policy and one of the parties is of that state (and the couple returns immediately to that state), that state may not recognize the marriage.

Regarding same sex marriages, Congress passed the Defense of Marriage Act, which provides that no state is required to respect a decree granting a same sex marriage, and that for federal purposes marriage is defined as union between a man and a woman.

Divorce

Courts will recognize divorce decrees of the courts of sister states if the sister state had proper jurisdiction and the decree is valid in the sister state. As long as one of the spouses has domicile in a state, the court of that state has jurisdiction even though the other spouse is not in that state (ex parte divorce).

Exception: If there was no bona fide domicile acquired, the other spouse can challenge a divorce decree in the other court (rebuttable presumption of bona fide domicile).

Child Custody

Since child custody decrees are not final (modifiable), the issue can be litigated anew by any court. However, under the Uniform Child Custody Jurisdiction Act, jurisdiction will remain with the 'home state' of the child until it changes to another state (+ other requirements).

Conflicts Between Federal and State Law

Diversity vs. federal question: In the federal courts, there are two basic kinds of controversies over which the federal judiciary has subject matter jurisdiction: (1) suits between *citizens of different states* (so-called *diversity* jurisdiction); and (2) suits involving a "*federal question.*"

Federal Question Jurisdiction

Generally: The Constitution gives the federal courts authority to hear "*federal question*" cases. More precisely, the federal courts have jurisdiction over "all civil actions *arising under the Constitution, laws, or treaties of the United States.*"

1. Federal claim: There is no precise definition of a case "arising under" the Constitution or laws of the United States. But in the vast majority of cases, the reason there is a federal question is that federal law is the *source of the plaintiff's claim*. To allege a federal defense to a claim arising under a state question would not be enough for federal jurisdiction.

a. Interpretation of federal law: It is *not* enough that P is asserting a *state-created* claim which requires *interpretation* of federal law.

b. Claim based on the merits: If P's claim clearly "arises" under federal law, it qualifies for federal question jurisdiction *even if the claim is invalid on the merits*. Here, the federal court must dismiss for failure to state a claim upon which relief may be granted, not for lack of subject matter jurisdiction.

c. Anticipation of defense: The federal question must be *integral* to P's cause of action, as revealed by P's complaint. It does *not* suffice for federal question jurisdiction that P *anticipates a defense* based on a federal statute, or even that *D's answer* does in fact raise a federal question. Thus the federal question must be part of a "well pleaded complaint."

Diversity Jurisdiction

A. Definition: The Constitution gives the federal courts jurisdiction over "*controversies...between the citizens of different states...*" This is the grant of "diversity jurisdiction." Additionally, the claim must be about something worth at least \$75'000.

The federal court also must have personal jurisdiction over defendant; the law applicable to determine personal jurisdiction in a diversity case is the law of the state where the court sits. (Rule 4(e) FRCP)

1. Date for determining: The existence of diversity is determined *as of the commencement of the action*. If diversity existed between the parties on that date, it is not defeated because one of the parties later moved to a state that is the home state of the opponent.

2. Domicile: What controls for citizenship is *domicile*, not residence. A person's domicile is where she has her true, fixed and permanent home.

3. Complete diversity: The single most important principle to remember in connection with diversity jurisdiction is that *"complete diversity" is required*. That is, it must be the case that *no plaintiff is a citizen of the same state as any defendant*.

B. Diversity involving corporations: For diversity purposes, a *corporation* is deemed a citizen of *any state where it is incorporated* and of the state where it has its *principal place of business*. In other words, for diversity to exist, no adversary of the corporation may be a citizen of the state in which the corporation is incorporated, or of the state in which it has its principal place of business.

1. Principal place of business: Courts have taken two different views about where a corporation's "principal place of business" is.

a. Home office: Some courts hold that the corporation's principal place of business is ordinarily the state in which its *corporate headquarters*, or "home office," is located. This is sometimes called the *"nerve center"* test.

b. Bulk of activity: Other courts hold that the principal place of business is the place in which the corporation carries on its main *production or service activities*. This is sometimes called the *"muscle"* test. This is the more commonly-used standard.

The Erie Doctrine

The law applied in federal courts sitting in diversity is the law of the state in which it sits. (*Erie*)

However, the federal court will apply its own procedural law, the Federal Rules of Civil Procedure (FRCP), that is. Exceptions are made only rarely in cases in which an important difference in the outcome would result, then state procedural rules are treated as substantive.

Choice of Law in Federal-Court Cases Involving State-Created Rights

In case of a conflict between different state laws, a federal court will apply the choice of law rules of the state in which it sits. (*Klaxon*)

Federal Common Law

Federal common law is applied only in cases where the U.S. as a party in exercising a constitutional function or power/rights and duties conferred by the Constitution is involved.

Federal common law also is applied to questions of international law (e.g., the act of state doctrine), where the rights of foreign nations are involved.

Federal Law In State Courts

State courts have to apply federal law unless the federal statute itself reserves jurisdiction exclusively to federal courts. Federal law exempts state law. If a substantive federal right is involved (e.g., right to jury trial), state court has to apply rather federal law than state law – if state law would hinder the federal right.

International Conflicts

The Scope of Legislative Jurisdiction: “Extraterritorial“ Regulations

ALCOA: substantial effects in the U.S. in case of Antitrust Law.

Traditional bases of jurisdiction over extra-territorial crimes under international law:

Territorial, wherein jurisdiction is based on the place where the offense is committed;

National, wherein jurisdiction is based on the nationality of the offender;

Protective, wherein jurisdiction is based on whether the national interest is injured;

Universal, wherein jurisdiction is conferred in any forum that obtains physical custody of the perpetrator of certain offenses considered as particularly heinous and harmful to humanity (genocide, air piracy, international terrorism, piracy);

Passive personal, wherein jurisdiction is based on the nationality of the victim.

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