CONFLICTING RULES OF INTERPRETATION AND CONSTRUCTION IN MULTI-JURISDICTIONAL DISPUTES

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But that steyne of law indead what stiles its neming?
– James Joyce[1]

I. INTRODUCTION

Courts routinely interpret or construe[2] language employed by private parties in contracts, conveyances, wills and other legal instruments. In interpreting or construing such language, a court usually applies the rules of interpretation and construction that have been promulgated under the authority of the state or country in which the court sits. Where a dispute involves foreign parties, the contract was executed in a foreign jurisdiction, or the transaction involves other foreign elements, however, a conflict of laws arises if applying foreign rules of interpretation or construction would lead to a different legal result from applying the forum's own rules of interpretation or construction. On such occasions, a court must decide whether to apply its own rules or to substitute the rules of the foreign state or country.

To illustrate, suppose Donna, a woman residing in Massachusetts, wants to transfer property to her wife Wanda. She executes a will devising land to "my wife"; she conveys a gift of personal property to "my wife"; and she designates "my wife" as beneficiary of a life insurance policy. The meaning of "my wife" may be governed by rules of interpretation or construction from at least four different jurisdictions—the place where the land is, the place where Donna was domiciled, the place where the words were written, and the place of litigation. The law of one state may interpret "my wife" to mean Wanda, as Donna intended, but the law of another may conclude that there is no "wife" because of a local prohibition against same-sex marriages. If Donna divorces Wanda and remarries Wilma, jurisdictions may differ over whether "my wife" refers to Wanda or Wilma.

Different problems can arise when drafters designate the law to

1. JAMES JOYCE, FINNEGANS WAKE 505 (1939).

2. Interpretation and construction can have different meanings. Some scholars apply "interpretation" to the process of ascertaining the meaning ascribed to language by the persons using the language and reserve "construction" for the process of judicial imposition of meaning on language when such intent is not ascertainable or determinative. *See infra* text accompanying notes 89-98, 142-47 (discussing First and Second Restatements); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 476 (5th ed. 2006). This distinction was not followed by early American authors, *see infra* notes 18 and 26, nor is it followed today by many prominent courts and scholars, *see infra* note 215 (discussing *Nedlloyd*'s use of "interpretation"); *see also* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 223 (3d ed. rev'd 2003); KERMIT ROOSEVELT, III, CONFLICT OF LAWS 86 (2010).

govern the meaning of their words. The trend for many years has been for courts to apply law chosen by parties to issues of interpretation and construction.[3] Courts have recognized limits to private party choice of law when chosen law conflicts with policies of interested states[4] or when chosen law has no relation to the transaction.[5] They have not recognized similar limits when chosen law furnishes rules that yield results that deviate from the known or probable intentions of the parties.[6]

This Article surveys American choice of law rules for interpretation and construction.[7] Part II traces the origin of these

3. *See* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 371-82 (2003) (discussing results of empirical research and finding that courts enforced choice of law clauses in eighty-five percent of cases). *See generally* RICHMAN & REYNOLDS, *supra* note 2, at 222-23; PETER HAY ET AL., CONFLICT OF LAWS 1085-86 (5th ed. 2010); CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 127-28 (2010); WEINTRAUB, *supra* note 2, at 482.

4. The need for disabling private parties from choosing foreign law is especially great for areas where a state has a strong interest in applying its law and where the parties are of unequal bargaining position. *See* Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 129 (2008) (criticizing enforcement of choice of law in contracts of adhesion because of lack of mutuality); *see generally* RICHMAN & REYNOLDS, *supra* note 2, at 227-29; HAY ET AL., *supra* note 3, at 1108-27; SPILLENGER, *supra* note 3, at 128-29; WEINTRAUB, *supra* note 2, at 487-97.

5. *See generally* RICHMAN & REYNOLDS, *supra* note 2, at 226; HAY ET AL., *supra* note 3, at 1090-98; WEINTRAUB, *supra* note 2, at 487-97. It is debatable whether states have any strong interest in displacing the law chosen by the parties to govern interpretation or whether the absence of a connection between a transaction and a designated state should by itself prevent the application of the designated state's rules of interpretation designed to effectuate intent. *See infra* text accompanying notes 152-54 (discussing lack of limits on Second Restatement section 204).

6. For example, suppose Donna purchased an insurance policy with proceeds payable to her "wife," intending the proceeds to go to Wanda. Suppose also that the contract provided that it was to be governed by the law of Modor where the designation of "wife" would not be recognized to apply to Wanda. It is hard to see how applying Modor law and frustrating the drafter's intent would promote party autonomy. Scholars have criticized the mechanical application of chosen law to furnish a rule of interpretation when it frustrates intent. *Cf.* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 660 n. 1(b) (3d ed. 1997) (criticizing the Second Restatement's application of chosen law to matters of interpretation and construction and asking, "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?"); JOHN O'BRIEN, CONFLICT OF LAWS 585 (2d ed. 1999) (suggesting choice rules should honor the testator's intent and recognize person designated as "wife" that testator intended to benefit, avoiding the application of chosen rules of construction that defeat intent); J.G. COLLIER, CONFLICT OF LAWS 273 (3d ed. 2001) (discussing application in England of law intended by testator to wills of movables).

7. It excludes a consideration of specific rules that apply under commercial law, *e.g.*, UCC § 1-105, and also omits consideration of important developments in

rules to nineteenth-century treatises that sought to achieve two divergent goals: effectuating the intent of the parties, on the one hand, and subordinating rules governing the reading of language to rules designed to secure the uniform application of the law of the place where the contract or conveyance was to be performed, on the other hand.[8]

Part III explores the history of the enforcement of private choice of law clauses. It shows how creative drafters began to manipulate traditional choice rules to achieve the application of desired law and how by the 1890s courts were applying law designated by the parties in form insurance contracts issued on a nationwide basis.

Part IV reviews the First Restatement of Conflict of Laws (1934),[9] and Part V discusses the Second Restatement of Conflicts (1969).[10] The history of both Restatements reveals that their drafters vacillated between the goal of effectuating the intent of drafters and the goal of enforcing legal consequences ascribed to language under the foreign laws selected by substantive choice of law provisions. The First Restatement failed to promulgate general rules to govern either interpretation or construction. Early drafts of the Second Restatement proposed uniform rules for interpretation alongside of rules for construction, but the final draft omitted rules for interpretation, leading to the unintended result that courts have applied rules designed for matters of construction to all issues involving the meaning of language.

Part VI considers recent decisions that have applied formal choice of law rules to matters of interpretation and construction. It argues that such rules can frustrate the intent of the parties and deviate from traditional authority. When they do so, the rules are not required by principles of party autonomy and serve no identifiable social policy.

This Article concludes that courts should apply their own forum

European law, Rome Convention art. 3. *See generally* WEINTRAUB, *supra* note 2, at 482-91.

8. This Article's focus on North American sources supplements Professor Reimann's thesis of historical convergence of common law and continental approaches. *See* Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571 (1999). First, it suggests that features identified with Savigny were anticipated by earlier American treatises, which themselves borrowed from continental antecedents of Savigny. *See infra* notes 15 and 20. Second, it emphasizes differences between American authors' search for the functional place of contract performance and Savigny's emphasis on party intent in determining the "seat of relationship." *See infra* note 61.

9. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].

10. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT]. Though promulgated in 1969, the text of the Second Restatement was not published in book form until 1971.

law to matters of interpretation and construction in the absence of a good reason for applying a different foreign rule.[11] In principle, there are good reasons for applying the law chosen by the parties, but it makes no sense to apply such law when it frustrates party intent or effectively renders a contract illusory.[12] A forum's own principles of interpretation will be flexible enough to consider any foreign law relied on by drafters, just as they will be flexible enough to consider the meaning of foreign words and phrases. Courts understand that a contract in Canada for "dollars" normally means Canadian dollars because that is what the parties normally intended. But in a case where the parties intended U.S. dollars, that is what they should get.

II. NINETEENTH-CENTURY AMERICAN AUTHORITY: THE PLACE OF CONTRACTING

A. Kent

James Kent's COMMENTARIES ON AMERICAN LAW (1827) exerted a formative influence on American Conflict of Laws.[13] Viewing the weak federal government and intensifying conflicts among American states over slavery as a threat to social and economic stability,[14] Kent

11. This Article does not try to catalog situations where it would be appropriate to apply foreign rules of interpretation and construction. All authorities apply foreign rules of construction in certain contexts to documents that employ language with fixed meanings on which third persons must rely. Thus, the meaning of technical language in deeds and wills of land imposing legal consequences irrespective of intent is construed according to the rules of the situs of the land. *See* FIRST RESTATEMENT, *supra* note 9, §§ 214(1), 251(1); SECOND RESTATEMENT, *supra* note 10, § 222 cmt. b.

False conflicts provide another kind of case where foreign law should displace forum rules of construction. Where a plaintiff selects a forum with no interest in the application of its law, solely for the purpose of benefiting from the forum's rule of construction, there appears to be no legitimate reason for applying forum law. In contrast, the goal of uniformity and the forum's own interest in discouraging such forum shopping supports the application of the law that would be applied by other interested states. *See infra* note 167 (discussing Weintraub's proposed treatment of construction conflicts).

12. *But see* Nedlloyd Lines v. Superior Court, 834 P.2d 1148, 1149 (Cal. 1992) (applying Hong Kong law chosen in contract to defeat claim that party failed to use good faith and reasonable means to perform contract), discussed *infra* notes 197 to 209.

13. Kent's treatise was not devoted exclusively to Conflicts, but it discussed Conflicts issues at length, returning to the problem repeatedly in the second volume, which treated personal rights. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (1827); *see id.* at *66-73 (aliens), *91-93 (marriage), *107-18 (divorce), *118-21 (judgments), *183-85 (marital property), *393-94 and *405-08 (bankruptcy), *428-36 (estates), *453-64 (contracts).

14. In discussing Kent's "preoccupation with international law," Barnes emphasizes both the international military challenges to the weak federal government

drew on the jurisprudence of Ulrich Huber (1647-1714) to ground law not in Blackstone's liberal ideals of personal entitlement but in trans-jurisdictional ordering principles designed to reduce international conflict and establish the conditions for commerce. [15]

Because he regarded conflicts of law principles as a fundamental source of legal rights, Kent treated conflicts problems at the start of his discussion of contract law. He explained that one particular place's law gives rise to a contract and defines the rights that exist as a result.[16] He understood that such rights exist as a form of imperfect or moral obligation that sovereign states will enforce in order to secure mutual benefits, since commerce across national boundaries requires that a contract valid under the law of the place of contracting have binding legal effect in all jurisdictions.[17]

Kent maintained that the law fixed at the place of contracting (*lex loci contractus*) governed both the validity and the construction of the contract.[18] He then turned his attention to the practical problem of determining where this place of contracting was located for different kinds of contracts.[19]

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and the "spectre of the dissolution" raised by anti-federalist movements. Thomas G. Barnes, *Introduction* to 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 16, 17 (Legal Classics Library ed. 1986) (1827).

15. *See* 2 KENT, *supra* note 13, at *457-58. ("The rule stated in Huber relative to contracts made in one country and put in suit in the courts of another, is the true rule, and one which the courts follow, viz.: the interpretation of the contract is to be governed by the law of the country where the contract was made . . . ."); *see generally* HAY, *supra* note 3, at 14-15 (discussing Huber's contribution to Conflicts theory). The first American treatise on Conflicts (1829) was influenced by Huber. *See generally* F.K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 28-30 (1993) (discussing S. LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (1828)). Huber provides a common source for both American treatise writers and Savigny. *See* FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS § 348 (Guthrie trans., 1880) (1848).

16. 2 KENT, *supra* note 13, at *454.

17. *Id.*

18. *Id.* at *454-55 ("The *lex loci contractus* controls the nature, construction and validity of the contract; and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established."). Kent recognized that courts would refuse to enforce rights under foreign contracts that were contrary to a forum statute or local public policy and explained these as limits on the preference for recognizing foreign contracts. *Id.* at *454-55.

Kent did not distinguish between interpretation and construction. He used "construction," *id.* at *454, *459, and "interpretation," *id.* at *457, without distinguishing between matters within the control of parties (a legal rate of interest) and those beyond party control (a usurious rate).

19. From divergent authorities, Kent extracted two general principles. First, "[p]arties are presumed to contract in reference to the laws of the country in which the contract is made, and where it is to be paid, unless otherwise expressed." *Id.* at *458. Second, "if a contract be made under one government, and is to be performed under

B. Story

Joseph Story's treatise on Conflict of Laws (1834)[20] followed Kent and Huber in recognizing the exclusive power of sovereign states over their territory and subjects and their absolute power to disregard rights arising elsewhere.[21] Story's doctrinal rules remained close to Kent's: "Generally speaking, the validity of a contract is to be decided by the law of the place, where it is made," unless it is to be performed in another country, in which case the law of the place of performance is to govern.[22] Like Kent, Story grounded this principle in international law and the implied consent of the parties, viewing the principle as a matter of commercial necessity, not mere convenience.[23]

Story also followed Kent in stating that the law of the place of the contract governs interpretation or construction.[24] Yet he qualified this rule, noting that it applied only to determining the legal effect of language in the absence of express terms in the contract.[25] For Story, legal effect adhered to the text of the contract or to the "nature of the contract" as determined by the place of the contract.[26] Though jurisdictions differed on other matters, Story thought they concurred

another, and the parties had in view the laws of such other country in reference to the execution [i.e., performance] of the contract, the general rule is, that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed [i.e., performed]." *Id.* at *459.

20. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1834) [hereinafter STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.)].

21. *Id.* § 23, at 24 (third maxim). Like Kent, Story cited Huber as authority for this maxim and for his comity theory in general. *Id.* at 24 n.1, 30 n.1. Accordingly, sovereign states recognize the force of other jurisdictions' laws on grounds of comity. *Id.* § 35, at 34. Story explicitly defended Huber's theory and Huber's use of the term "comity." *Id.* §§ 31, at 32; 33, at 33; 38, at 37.

22. *Id.* §§ 242, at 201; 280, at 233.

23. *Id.* § 242, at 201-02.

24. "[T]he law of the place of the contract is to govern, as to the nature, obligation, and the interpretation of [the contract] . . . ." *Id.* § 263, at 219. Story used "interpret" and "construe" interchangeably. He favored "interpretation" in the first edition of his treatise. *Id.* §§ 270, at 225; 272, at 227; 275, at 230. Yet he also used "construe." *Id.* §§ 278, at 232; 279, at 232. He employed "construction" in text that was added after the first edition. *Cf.* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 276a, at 231; 278a, at 232 (Boston, Charles C. Little & James Brown, 2d ed. 1841) [hereinafter STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.)].

25. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.), *supra* note 20, § 263, at 219-21.

26. *Id.* § 263, at 220-21. He gives the example of a warranty that arises in a sales contract by operation of the law of the place of contracting. *Id.* § 264, at 221.

on the basic rules regarding interpretation[27] and shared the goal of ascertaining "the real intention of the parties," and when that was uncertain, they all sought to ascertain "the true sense of the words used, and what ought to be implied in order to give them full effect."[28]

Story proposed another rule, potentially in tension with his search for "real intention." When words were obscure, ambiguous or their meaning changed in different jurisdictions, he maintained that "if the common intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom or usage of the place, where it is made, that course is to be adopted."[29] Though he acknowledged one exception (where some English and American authorities had applied the law of the situs to the construction of words in contracts affecting rights in land[30]), this did not prevent him from formulating a broad rule: "The general rule then is, that, in the interpretation of contracts, the law and custom of the place of the contract are to govern."[31]

In a later edition Story added a discussion of a hypothetical case to illustrate his rule. A note specified payment in "pounds," but the word could mean either English or Irish pounds, which differed in value.[32] Without even considering the possibility that the meaning of "pounds" might be determined by the rule designed to determine real intentions, he concluded that the note must be paid in Irish pounds if it was expressly made payable in Ireland; it must be paid in English pounds, if expressly payable in England; and it must be paid in the currency of the place where the note was made if no place of payment was specified.[33]

27. This phrase was added after the first edition. *Compare id.* § 270, at 225, *with* STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.), *supra* note 24, § 270, at 225.

28. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.), *supra* note 20, § 270, at 225. This phrase was enlarged to "true and full effect" in later editions. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.), *supra* note 24, § 270, at 225.

29. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.), *supra* note 20, § 270, at 226 (citing Justinian); *see id.* § 271, at 227 (discussing specific example of same word given different meaning in two countries). Story even proposed that entire clauses should be inserted to secure rights and duties imposed under the law of the place of contracting. *Id.* § 270, at 226.

30. *Id.* § 271, at 227.

31. *Id.* § 272, at 227. Story added in later editions the words "in all cases where the language is not directly expressive of the actual intention of the parties, but it is to be tacitly inferred from the nature, and objects, and occasion of the contract." STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.), *supra* note 24, § 272, at 227.

32. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.), *supra* note 24, § 272a, at 228-29.

33. *Id.* § 272a, at 228-29. While Story believed this was "[o]ne of the simplest

Story never explained whether the place of performance mattered because it enforced the parties' presumed intent or because it was necessary to avoid or resolve a conflict of laws. On the one hand, though the meaning of words at the place of performance may conform to the intentions of parties, it is easy to imagine situations where the presumption is not warranted and should be rebuttable.[34] On the other hand, it is not clear why a sovereign should defer to the meaning ascribed by usage at the place of performance (or making). Under Story's general principle, formal choice of law rules should never prevent a forum from applying normal cannons of construction to effectuate the real intent of the parties.

C. Nineteenth Century Cases

Following Kent and Story, leading cases treated contractual rights as fixed by the law of the place of contracting.[35] Courts looked to the place of the making and performance of the contract. When this place was not fixed by the terms of the contract, courts consulted party intent.[36] In other words, courts considered party intent for the limited purpose of determining the location of performance; they did not consider party intent independently on some theory that the parties had the power to select the law that would govern.[37]

In *Andrews v. Pond*, Chief Justice Taney concluded that a promissory note was governed by the law of the place where it was formed because the note did not specify an alternative place of

cases," *id.*, and one free of controversy, his application of the law of the place of performance (or, alternatively, place of making) deviates from the First Restatement rule that the place of contracting for a note is its place of delivery. FIRST RESTATEMENT, *supra* note 9, § 312.

34. Bull and John are lifelong residents of London. Bull lends John ten pounds (English currency). John delivers a note to Bull at a London pub promising to pay Bull "ten pounds," payable at the Galway racetrack on April 1. Such scenarios make an effective case for rebutting Story's second rule and also make a plausible case for displacing his rule by a presumption that interpretation is governed by the law of common domicile.

35. *See, e.g.*, Pritchard v. Norton, 106 U.S. 124, 129 (1882).

36. *See id.* at 134-35.

37. Scholars have read nineteenth-century American decisions as evidencing a trend towards judicial application of the law the parties intended to govern their agreements. *Cf.* HAY ET AL., *supra* note 3, at 1086 n.8 (citing Pritchard v. Norton, 106 U.S. 124 (1882) and Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825)). The earliest case cited for the doctrine of party autonomy actually involved neither a contract nor choice of law. It published the fortuitous dictum, by way of explaining the legality of the Rules of Decision Act, that "this section is the recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made." *Wayman*, 23 U.S. at 48. *Wayman* seems to have worked its way into the Conflicts literature due to the facts that its author was Chief Justice Marshall and that part of the sentence quoted above was quoted in *Pritchard v. Norton*, 106 U.S. 124, 136 (1882) (quoting and citing case).

performance.[38] Pond had defaulted on a note payable in Alabama and renegotiated the obligation while he was located in New York in order to avoid being sued in New York.[39] His new note increased the amount of the principal debt by ten percent and also specified ten percent interest.[40]

The Supreme Court reversed the trial court's determination that the note was usurious.[41] In addressing the situation that would have existed, had the note specified a legal rate of interest under Alabama law and specified that it was payable in Alabama, the opinion observed:

> The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury.[42]

The Chief Justice acknowledged that this general rule did not apply to the case before the Court where the contract did not specify a place of performance.[43] In such a situation, he announced, the contract was governed by the law where it was made: "Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance."[44]

38. 38 U.S. 65, 78-80 (1839).

39. The opinion specifically observed that avoiding suit in New York was Pond's motive for agreeing to pay damages and ten percent interest on the protested note. *Id.* at 73.

40. Pond refused to pay the second note, arguing that the increased debt was usurious under New York law. *Id*. The federal trial court in Alabama directed a verdict for defendant on the ground that the debt was void as usurious under New York law. *Id*. at 74.

41. Under New York law, the question was one of the parties' intent—whether they intended to increase the principal debt as a device to conceal illegal interest or whether they intended it as a bona fide exchange (or discount) rate. Because the trial court considered only the New York usury statute and excluded evidence of the actual rates of exchange, the Supreme Court reversed. The Court was quite specific in reversing on the second and eighth grounds only, which related to the plaintiff's attempt to support the increased debt by evidence of the variable rates of exchange enforceable under New York law. *Id.* at 74-75, 80.

42. *Id.* at 77-78.

43. *Id.* at 78.

44. *Id.* It was unclear whether New York commercial law or general federal common law supported the Court's conclusion that notice of protest prevented a holder from avoiding a defense to the note's principal obligation based on a rate of interest that was usurious in New York. *Cf. id.* at 79 (stating general rule and citing English case).

Although the Court did not purport to establish a separate rule for usury, the decision is part of a history of decisions elaborating special rules for lawful interest.

In *Pritchard v. Norton*, a New York citizen signed and delivered an indemnity bond in New York, agreeing to indemnify a Louisiana citizen's obligation on a surety bond that the Louisiana citizen had signed for an appeal pending in Louisiana.[45] After the appeal was lost, the Louisiana citizen paid his obligation on the surety bond in Louisiana and then sued the New Yorker in Louisiana to enforce the indemnity agreement.[46] The New York defendant contended that the indemnity agreement was invalid under New York law because of lack of consideration.[47] The trial court applied New York law, and the Supreme Court reversed,[48] holding that the indemnification agreement was governed by Louisiana law.[49]

Justice Matthews concluded that Louisiana law applied for three separate reasons.[50] First, where the law of the place of contracting invalidated a contract, he proposed an alternative principle, electing the *lex loci solutionis*, the law that upheld the contract.[51] Second, he concluded that Louisiana law governed as the place of performance intended by the contract.[52] "[I]t is clear, beyond any doubt, that the

These led the drafters of the Second Restatement to adopt a specific validating rule. SECOND RESTATEMENT, *supra* note 10, § 203 ("The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.").

45. 106 U.S. 124, 125 (1882).

46. *Id.* at 128.

47. *Id.*

48. The opinion does not expressly identify the grounds on which the Circuit Court based its conclusion that New York law applied. Presumably the trial court judgment was based on the grounds argued in support of the judgment on appeal.

> The argument in support of the judgment is simple, and may be briefly stated. It is that New York is the place of the contract, both because it was executed and delivered there, and because no other place of performance being either designated or necessarily implied, it was to be performed there[.]

Id. at 128.

49. *Id.* at 138.

50. Justice Matthews considered and rejected the idea that Louisiana law might apply as the *lex fori*: "The question of consideration . . . is not one of procedure and remedy. It goes to the substance of the right itself . . . ." *Id.* at 135.

51. *Id.* at 138. The opinion is rightly regarded as one of the chief authorities of *lex loci solutionis* as Justice Matthews articulated this as the principal reason for applying Louisiana law.

52. *Id.* Justice Matthews did not separately identify Louisiana as the law of the place of contracting but treated this argument as part of his consideration of *lex loci solutionis*. *See id.* However, he considered *lex loci solutionis* itself a special principle for identifying the *lex loci contractus*. *Id.* at 136. He explained that the law of the place of contracting was normally the place of making or the place fixed for the performance. *Id.* at 137. Where performance was not specified, courts fell back on the law of the place of making (as equally) a place of performance, but such a presumption made no

obligation of the indemnity was to be fulfilled in Louisiana, and, consequently, is subject, in all matters affecting its construction and validity, to the law of that locality."[53] Third, he found extensive case law authority for the principle that the validity of a surety bond "is controlled by the same law which controls the principal indebtedness."[54]

Justice Matthews emphasized party intent as a ground for applying the law that validated their agreement: the fact that Louisiana law validated the contract "is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent."[55] The opinion quoted Lord Mansfield's words: "The law of the place . . . can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed."[56]

Despite these references to party intent, the Court did not look to party intent as an independent criterion for choice of law. Rather it looked to party intent as an indication of the place of expected execution or performance of contractual duties.[57] Intent provided an

sense when the contract was invalid where made. *Id.* at 135. Under such circumstances, courts were justified in inferring that parties expected execution (performance) in the place where the contract was valid. *Id.*

Nevertheless, Justice Matthews's additional arguments for applying the law of the place of validity also would have supported an independent conclusion that that was the place of intended performance. *See id.* at 141. He reasoned that Pritchard's obligation on the appeal bond was firmly fixed in Louisiana, and the debt on the appeal bond was the condition of Norton's duty to indemnify. *Id.* at 138. More specifically, Pritchard could demand indemnification within Louisiana either prior to paying the appeal bond or after doing so.

> He was entitled to demand this before any payment by himself, and to require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if [he had to first pay the appeal bond,] . . . he was entitled to be reimbursed the amount of his advance at the same place where he had been required to make it.

Id.

53. *Id.* at 138.

54. *Id.* at 139.

55. *Id.* at 137. The second headnote to the opinion still more forcefully linked choice of law to party intent and presumed parties intended the law that validated their contract. *Id.* at 124. Though the headnote is not part of the opinion, its emphasis on *lex solutionis* probably influenced subsequent understanding of the opinion.

56. *Id.* at 136 (quoting Robinson v. Bland, (1760) 96 Eng. Rep. 129, 130 (K.B.) (Mansfield, L.)) (internal quotation marks omitted). Mansfield's words, suggesting the importance of party intent, would be quoted in cases that looked directly to party intent for choice of law. *E.g.*, Scott v. Perlee, 39 Ohio St. 63, 69 (1883); Kellogg v. Miller, 13 F. 198, 201 (C.C.D. Neb. 1881).

57. *Pritchard*, 106 U.S. at 137. The authorities cited by the Court make clear that parties are bound by a law that governs the contract because they have agreed to

important clue about the location of this place but did not independently guide the judicial construction of contracts. Justice Matthews made this clear in *Pritchard* by applying law that validated the contract based on the roundabout presumption that parties intended that place since its law upheld the contract. If intent were the true guide, Justice Matthews would have validated the contract because the parties intended it to be valid.[58]

III. ORIGINS OF PARTY AUTONOMY AND PRIVATE CHOICE OF LAW AGREEMENTS

A. Place of Performance and Party Intent

Although some scholars read Kent and Story as early proponents of party autonomy in choice of law,[59] neither Kent nor Story ever suggested that private parties could directly select the law that would govern the interpretation or construction of a multi-state transaction. For conflicts involving contracts, they looked to party intent solely for the purpose of determining the place of intended performance when it differed from the place of making.[60]

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submit to the jurisdiction's authority, not because they have autonomously absorbed the law into their private agreement. *See id.* "It is necessary to consider by what general law the parties intended that the transaction should be governed, *or rather, by what general law it is just to presume that they have submitted themselves in the matter*." *Id.* (emphasis added) (internal quotation marks omitted). "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by express words or by tacit implication—*as the place to the jurisdiction of which the contracting parties elected to submit themselves." Id.* (emphasis added) (internal quotation marks omitted).

58. The application of the law of the place of contracting became so firmly established by the late nineteenth century that courts applied it even in situations where it violated important policies of the forum state. In *Fonseca v. Cunard Steamship Co.*, 27 N.E. 665, 666 (Mass. 1891), the Supreme Judicial Court of Massachusetts held that English law applied to a London-to-Boston passenger ticket issued in England and held that a provision excluding liability for negligence was enforceable against the passenger. "The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy." *Id.* at 667 (citation omitted). The court did not mention where the negligence occurred or the citizenship of the parties, presumably because these facts were unimportant to the place of contracting or to public policy limits on the doctrine.

59. *See* HAY, *supra* note 3, at 1086 n.8 (including Story in citation of string of authorities promoting choice of law as designed to effectuate party intent).

60. Passages by Kent and Story are occasionally quoted for the principle of party autonomy. For example, Kent writes, "[T]he maxim is, that *locus contractus regit actum*, unless the intention of the parties to the contrary be clearly shown." KENT, *supra* note 13, at *458. Story writes:

> The rules already considered suppose, that the performance of the contract is

Kent and Story looked to party intent as indicating the place of the performance of contractual duties—hence the probable place of execution (completion) or breach.[61] Their rules were rooted in principles of territoriality: "The ground of [*lex loci contractus*] . . . is, that every person, contracting in a place, is understood to submit himself to the law of the place, and silently to assent to its action upon his contract."[62] To avoid any misconception that this law applied by the operation of party intent, Story emphasized, "It would, [perhaps,] be more correct to say, that the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons, property, and transactions within its own territory."[63]

In contrast to the objectives of domestic contract law, Kent and Story regarded the chief goal of the Conflict of Laws as the reduction of interstate conflict and promotion of conditions of interstate commerce.[64] Story invoked territoriality to explain the rule that the

> to be in the place, where it is made, either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance.

STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.), *supra* note 20, § 280, at 233 (citing Kent and other authorities). A similar reading might be imposed on Story's explanation for why the common law should govern contractual language describing a fee tail where the contract was made in England and involved land in England. "[T]o construe them otherwise, than according to the common law, would defeat the intent of the parties, and uproot the solid doctrines of the law." *Id.* § 275, at 230. The word "intent" in this sentence was altered to "intention" in later editions. *See* STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.), *supra* note 24, § 275, at 292. The context of such passages makes clear that Kent and Story referred to party intent to determine the place of the contract, not to determine what law they intended to apply.

61. They did not defer to party intent because they believed parties had the power voluntarily to submit to a particular legal regime. Their use of party intent to identify the real place of contracting contrasts with Savigny's reference to party intent to establish the juridical "seat of the relationship." For Savigny, "[t]he basic rule was freedom of choice." Reimann, *supra* note 8, at 595.

62. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.), *supra* note 20, § 261, at 217. The first word "place" was changed to "country" in later editions. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.), *supra* note 24, § 261, at 217.

63. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.), *supra* note 20, § 261, at 218.

64. This explains why they devoted so much attention to rules identifying the place of contracting. Kent's discussion of the problem of the place of contracting is limited to promissory notes. Almost all of Kent's rules are explained by his goal of applying the law of the place where the agreement fixed the conduct on which the breach of contract claim is based. *See* KENT, *supra* note 13, at *459-62. Story treated more kinds of

terms of a contract executed by foreigners in their home country must be interpreted or construed according to the foreign country's law.[65] He rejected the application of the law of the parties' common domicile, though such a rule would advance the parties' expectations.[66] He explained that the construction at the place of contracting must apply because that place's law fixed the legal effect of language in accord with the judicial decisions of the foreign country where the contract was made.[67]

B. From Presumed Place to Intended Law

The idea that the designated place of contracting provided the *lex loci contractus* encouraged creative drafters to manipulate the place of execution or performance in order to secure the application of that place's law when choice of law was important for them.

One court as early as 1867 approved the power of parties to select the law that governed their agreement. The facts of *Arnold v. Potter*[68] fall within a class of decisions enforcing usurious contracts that anticipated *Pritchard*'s rationale that the parties are presumed to intend performance to occur where the higher rate of interest is valid. In *Arnold*, Justice Wright offered a different explanation that looked directly to party intent about governing law. After restating the general rule that the law of the place of contracting was the place where the contract was made unless the parties provided for performance elsewhere, he added: "The parties may, however, if it is made in one place to be executed in another, stipulate that it shall be governed by one or the other."[69] Although the case involved no

contracts and grappled with a larger range of inconsistencies among the authorities. He, too, tried to bring the cases under a general rule that would enforce the law applicable at the place of probable suit. He expressed this in one of his sub-rules: "The proper rule would seem to be, in all cases [involving conflicting currency exchanges], to allow that sum in the currency of the country, where the suit is brought, which should approximate most nearly to the amount, to which the party is entitled in the country, where the debt is payable . . . ." STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed.), *supra* note 20, § 309, at 255.

Story explained that the word "pounds" in a note "made" in England must mean English pounds, and it would be "monstrous" to interpret the word as meaning the less valuable American "pounds" in litigation in an American court. *Id.* § 271, at 227. For Story, such a result would be "monstrous," not because it violated the parties' intentions, but because it disregarded the "nature" or "substance" of the contract fixed by the law of the place of contracting. *Id.*

65. *See id.* § 270, at 226-27.

66. *Id.* § 279, at 232-33.

67. *Id.* § 277, at 231.

68. 22 Iowa 194 (1867).

69. *Id.* at 198. The paragraph immediately following the rule makes clear that its authority derived from cases that had enforced usurious interest rates on the theory that such rates indicated the parties' intention that the place with such rates was the

contractual choice of law, the court approved a jury instruction that directed the jury to sustain the interest under Iowa law "if the parties [made the contract] . . . with a full understanding that the law of Iowa was to govern as to the interest."[70]

In explaining the holding, Justice Wright approved of the idea of private choice of law:

> [W]hat we do hold is that, if A., of Iowa, in good faith, borrows money of B., in Illinois, gives security on land in Iowa, and they . . . agree that the law of Iowa shall govern, [then] a note given in pursuance of said contract in Illinois, bearing the interest allowed by our laws, would not be usurious.[71]

Other courts adopted similar reasoning to sustain usurious contracts.[72] While the usury cases indicate that the parties' intent

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place of contracting. But as Justice Wright restated the rule: "if the law of the one place differs from that of the other, it is competent for them to agree upon the rate in either locality, and thus, by their contract, [to] determine the law which shall govern this incident thereof." *Id.*

70. *Id.* at 199.

71. *Id.* at 200.

72. *See, e.g.*, Kellogg v. Miller, 13 F. 198, 199 (C.C.D. Neb. 1881) (applying Nebraska law to enforce contractual interest rate usurious under law of New York). The court observed that Nebraska was probably the place of contracting but did not rest its decision on that characterization. *Id.* at 200. It observed the enforcement of usurious interest under such circumstances was well settled and explained that "it was competent for citizens of different states . . . to contract in good faith for the rate of interest, and with reference to the law of the state where the maker resides, and where the property mortgaged to secure the note is situated." *Id.* After discussing the opinion of *Arnold v. Potter*, the court observed: "[T]here is but a single question of fact to be considered, and that is the question of good faith. Did the parties in good faith agree that this loan should be made according to, and to be governed by, the law of Nebraska?" *Id.* at 201.

Although *Kellogg* applied forum law, other decisions make clear that the trend was to apply law that upheld contractual interest rates rather than forum law. In *Scott v. Perlee*, 39 Ohio St. 63, 69-70 (1883), the court sustained the application of Illinois law to sustain a rate of interest illegal in Ohio on a note that would otherwise have been governed by Ohio law. The court explained that the interest rate was governed by Illinois law as the law that the parties intended in good faith to govern their contract. *Id.* at 66. "[P]arties may, in good faith, stipulate for the rate of either, and thus expressly determine with reference to the law of which place that part of the contract shall be decided." *Id.* at 66-67. The court opined that Illinois law was probably the law of the place of intended performance, but it emphasized that the place of contracting or performance was not necessary to its decision:

> There is no reason why a citizen of Illinois, or any other state, may not come into Ohio and borrow money to be used in the state of his residence, and in good faith contract with reference to the laws of the latter state, independently of where his note is executed or where it is legally presumed to be payable. In such case the only question is one of good faith. Did he honestly contract with reference to the law of his allegiance, the law of the state or country where he lives?

Id. at 68.

was inferred from the specified interest rate, these cases did not lead to the widespread adoption of express choice of law clauses in such agreements.

Insurance lawyers deserve the credit for introducing express choice of law devices into standard form insurance contracts in the late 1800s.[73] Designating a place of making or performance was possible for contracts where the place of performance was indeterminate.[74] By 1900 it was "not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer."[75] Courts enforced such provisions,[76] though they also began to impose restrictions on party choice of law when chosen law offended public policy.[77] Parties

73. *Cf.* Baxter v. Brooklyn Life Ins. Co., 23 N.E. 1048, 1049 (N.Y. 1890) (reviewing an insurance policy that provided it was "made and to be executed in the state of New York and construed only according to the laws of that state"); Griesemer v. Mut. Life Ins. Co. of N.Y., 38 P. 1031, 1033 (Wash. 1894) (reviewing insurance policy that provided, "[t]his policy is a contract made and to be executed in the state of New York, and shall be construed only according to the charter of the company and the laws of that state").

74. An example is the contract language in *Mutual Life Insurance Co. of New York v. Cohen*, 179 U.S. 262, 264 (1900), where the policy stipulated that it did not become binding "until the first premium had been paid and the policy delivered." The Court concluded that because the first premium was paid in Montana, "under the general rule, the contract was a Montana contract." *Id.*; *see also* Equitable Life Assurance Soc'y v. Pettus, 140 U.S. 226, 232 (1891) (concluding that a contract that provided that it shall not take effect until the first premium was paid and policy was delivered was a Missouri contract when the policy was delivered and the premiums were paid in Missouri). Other opinions referred to the possibility of hypothetically designating a place of contracting as a justification for applying law other than that of the place of contracting. *Cf. Scott*, 39 Ohio St. at 67 ("If the parties to the note in question had expressly stipulated in the note, that it was payable in Illinois, the [rate of interest] would be perfectly valid, although the note was executed in Ohio. Is it rendered invalid by reason of the omission to make that express stipulation?").

75. *Cohen*, 179 U.S. at 267. This opinion's endorsement of choice of law agreements was pure dictum, since the contract in dispute did not contain a choice of law provision. The Court was unwilling to find a choice of New York law from language in the application that it was "subject to the charter of such company and the laws of said state." *Id.* The Court further opined that even if the parties selected New York law, they may only have selected those parts of New York law that would apply extraterritorially to the facts of the case. *Id.*

76. In *Griesemer*, the court rejected the insurance company's defense that a claim was barred due to nonpayment of premiums where the policy effectively chose New York law by specifying New York as the place of making and execution and a New York statute prohibited forfeiture without notice. 38 P. at 1031. Consistent with the language of the policy, the court observed that the parties' intention was "to locate the place of its execution" in New York, which led the court to "construe it as though it had been actually executed and delivered in the state of New York." *Id.* at 1033. The court further found that the notification was insufficient notice. *Id.* at 1033-34.

77. *Cf.* Dolan v. Mut. Reserve Fund Life Ass'n, 53 N.E. 398, 399 (Mass. 1899)

and courts moved quickly from designated place to designated law. By 1921 it was "well settled that the parties, by their own act and will, may agree to be bound by the law of a foreign jurisdiction, and such law will be enforced in the forum where the parties reside."[78] Chosen law was applied readily to interpret or construe the meaning of technical or ambiguous terms in contracts,[79] but always in the context of standard form insurance contracts.

(holding that life insurance policy bought by Massachusetts resident in Massachusetts was "made in" Massachusetts notwithstanding choice of law clause that the "contract shall be governed by and construed only according to the laws of the State of New York"). The issue on which New York law differed is not specified in the opinion. The court broadly proclaimed that private choice of law would not permit the displacement of forum law by a law that was contrary to local public policy:

> [W]here parties are contracting in this commonwealth in regard to a matter which, under their contract, plainly would be governed by the laws of this State enacted on grounds of public policy, it is at least doubtful whether they can be permitted to nullify those laws in their application to their contract by a stipulation that the contract shall be governed by the laws of another state.

Id. at 399. This general rule is flatly inconsistent with the principle of validation that had become established in challenges to usurious interest rates. *See supra* note 44. The court's decision was grounded rather on concerns specific to insurance contracts and fair notice.

The insurance contract in *New York Life Insurance Co. v. Cravens*, 178 U.S. 389, 395 (1900), provided that the policy "shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the state of New York, the place of the contract being expressly agreed to be the principal office of the said company, in the city of New York." Despite the express designation of New York law, the Missouri Supreme Court held on grounds of policy that the contract was governed by a Missouri statute. *Id.* The Supreme Court affirmed, finding no constitutional objection to the state's disregard of a private choice of law that was inconsistent with state policy. *Id.* at 396-401.

78. Boole v. Union Marine Ins. Co., 198 P. 416, 417 (Cal. Dist. Ct. App. 1921) (citing Pritchard v. Norton, 106 U.S. 124, 129 (1883)).

79. *Id.* (adopting meaning of "constructive total loss" under English law where marine insurance policies specified that claims were to be adjusted according to, and settlements made in conformity with, English law). The decision is notable for construing the insurance policy in favor of the insurer, for rejecting the argument that the choice of English law should not be enforced where terms were defined by California statute, and for rejecting the argument that choice of English law should be void as a violation of California public policy. *Id.* The court observed:

> The general rule is that, in the absence of statutory prohibition, the parties may stipulate that the policy shall be construed and governed by the laws, usages, and customs of a foreign state, and such laws, usages, and customs . . . as are applicable shall be deemed to be a part of the written contract.

Id.

IV. THE FIRST RESTATEMENT OF CONFLICT OF LAWS

A. First Principles

Joseph Beale, principal drafter of the First Restatement of Conflicts, understood conflict of laws to be rooted not in comity but in a system designed to protect rights that vested under the laws in force in a particular jurisdiction. The shift from comity to vested rights required changes to the formal rules governing contracts. Because he did not believe legal rights could vest merely as a result of private party intent, Beale rejected the enforcement of choice of law agreements.[80] This was inconsistent with case law[81] and proved to be controversial from the start.[82] Nevertheless, the First Restatement rules for contracts fixed the rights that vested under the place where the contract was formed for most issues.[83] Only details of performance were governed by the law at the place of performance.[84] These rules deviated from Kent, Story, and reported decisions in privileging the place of formation over the place of performance and in excluding party intent as a consideration in determining the place of performance.[85]

The drafters of the First Restatement treated interpretation and construction differently. They excluded interpretation from conflict of

80. The drafters explained that there was insufficient legal authority for enforcing private choice of law agreements, *see* HAY ET AL., *supra* note 3, at 1086, but the omission of any rule coupled with other specific jurisdiction-selecting rules effectively prevented the enforcement of such agreements.

81. *See supra* notes 68-79 and accompanying text.

82. *See* WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 392 (1942) (criticizing Beale's reasons for rejecting law chosen by parties); Arthur Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893, 898-99 (1942) (criticizing rejection of party autonomy). Despite the exclusion of party choice from the First Restatement and Beale's ongoing criticism of the practice, both courts and scholars continued to approve of choice of law agreements, and the drafters of the Second Restatement were able to cite extensive authority for the practice. *See* SECOND RESTATEMENT, *supra* note 10, § 187 reporter's note.

83. FIRST RESTATEMENT, *supra* note 9, §§ 311 cmt. d (place of contracting defined as place where "the principal event necessary to make a contract occurs"), 332 (place of contracting applies to party capacity, required formalities, consideration, illegality and scope of performance).

84. *See id.* § 358.

85. Drafters of the First Restatement failed to identify clearly their departure from established law, presumably because they did not see it. Perhaps because they preserved the "place of contracting" language but did not appreciate that earlier authorities understood the "place of contracting" and even the "place of execution" to be that place where the duties were discharged (i.e., performed). To this day, the First Restatement's views on contracts are often identified closely with the majority approach among courts in the early twentieth century. *See, e.g.*, Reimann, *supra* note 8, at 579 (identifying First Restatement position as followed by the majority, but also noting substantial judicial deviation from its rules).

laws, and they provided no rules of general application for selecting among competing rules of construction.[86]

B. Preliminary Classification and Procedure

1. Evidence and Procedure

Under the First Restatement, matters of procedure are governed by forum law.[87] Interpretation and construction can fall under the classification of procedure because procedure includes the form of proceedings,[88] rules of evidence,[89] and presumptions or inferences.[90] For example, a forum should apply its own rule of evidence to find that a contracting party has assented to a limitation of liability included in a bill of lading despite the fact that receipt of the bill of lading alone is insufficient evidence of assent under the law of the place of contracting.[91]

86. The omission of a specific rule for interpretation and the prevalence of rules applying the law of the place of contracting to most matters have encouraged a number of authors to conclude that interpretation is governed by the place of contracting. Peter J. Kalis et al., *The Choice–of-Law Dispute in Comprehensive Environmental Coverage Litigation: Has Help Arrived from the American Law Institute Complex Litigation Project?*, 54 LA. L. REV. 925, 928 n.8 (1994) ("More specifically, the First Restatement provided that the interpretation of contracts is to be accomplished pursuant to the law of the state in which the contract was made . . . ."); Joseph E. Smith, Note, *Civil Procedure—Forum Selection—N.C. Gen. Stat. § 22B-3*, 72 N.C. L. REV. 1608, 1613 (1994) ("Under [First Restatement] principles, the law of the state where a contract was entered controls disputes over enforcement and interpretation of a contract."). Other authors have failed to appreciate the First Restatement's all-important distinction between contracts to convey land and conveyances. *See* Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585, 589 (1987) ("[The First Restatement] referred all questions regarding real property to the law of the situs."). *But see* FIRST RESTATEMENT, *supra* note 9, § 340 (law of "place of contracting," not situs, governs validity of contract to convey land). Beale's distinction, which departed from some established authority, see STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed.), *supra* note 24, § 372f, at 306-07, has important consequences for interpretation, where the rules of situs may govern a conveyance but the place of contract may govern a contract to convey.

87. FIRST RESTATEMENT, *supra* note 9, § 585 ("All matters of procedure are governed by the law of the forum."). This includes the preliminary determination of whether an issue is procedural. *Id.* § 584 ("The court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure.").

88. *Id.* § 585 cmt. a. Forum law determines whether a judge or jury decides a disputed matter. *Id.* § 594 ("The law of the forum determines whether an issue of fact shall be tried by the court or by a jury.").

89. *Id.* §§ 597-98 (admissibility of evidence). This is limited by the special treatment of integrated contracts and competence of witnesses. *Id.* § 596 ("The law of the forum determines the competency and the credibility of witnesses.").

90. *Id.* § 595(2) ("The law of the forum governs presumptions and inference to be drawn from evidence.").

91. *See id.* § 595 illus. 4. Conversely, forum evidence law requiring proof of

The First Restatement's treatment of procedure may apply to many conflicts involving interpretation and construction. Forum law determines what issues are decided by judge or jury. In a case involving the meaning of the words "my spouse," a court may determine whether the words are ambiguous, whether supplemental evidence is admissible, and whether the issue should be submitted to the jury.[92]

2. Contract Interpretation and Construction

The First Restatement addresses the problem of interpreting contract language only in comments. A comment to the rule on validity observes, "[t]he rules for ascertaining the meaning of the words of a contract, not being a question of the Conflict of Laws, are considered in the Restatement of Contracts."[93] A comment to the rule on performance elaborates:

> The interpretation of the meaning of language in a contract depends upon the law of Contracts and is not a question of Conflict of Laws . . . . The legal effect of the language so interpreted as creating an obligation depends upon the law of the place of contracting . . . , but the law of the place of performance determines the method and manner of performance.[94]

These comments reveal the drafters' assumption that courts

affirmative assent to a limitation of liability will bar the defense even if receipt of the limitation was sufficient under the law of the place of contracting. *See id.*

The drafters of the First Restatement saw nothing controversial about the illustration offered for the application of forum rules of evidence; yet it reveals the difficulty of distinguishing a matter of procedure (sufficient proof of assent) from one of substance (the formal requirements for an enforceable contract). The First Restatement offers no legal authority for its proposed solution, which may be bad law. The proposed result is objectionable on the ground that contracting parties may rely on the law of the place of contracting (regardless of how it is characterized) in creating formal evidence of assent. The enlargement of the shipper's obligation beyond what it had agreed to is inconsistent with case law. *See* Fonseca v. Cunard S.S. Co., 27 N.E. 665, 667 (1891) (looking to English cases to determine if passenger's acceptance of ticket established legal assent to attached terms). It may violate due process unless the forum has a state interest in requiring additional evidence. *See* Home Ins. Co. v. Dick, 281 U.S. 397, 407-08 (1930).

92. Forum law governs how the issue will be resolved and, accordingly, whether the question is classified as a matter of fact or law. FIRST RESTATEMENT, *supra* note 9, §§ 594-95. According to these rules a court should apply forum law and permit a jury to assign the intended meaning to language even when such an interpretation is incompatible with the meaning assigned to the language under the substantive law that otherwise applies. *See id.* Such a procedural solution frustrates the substantive legal goals served by the rules of construction of the other jurisdiction.

93. *Id.* § 332 cmt. a.

94. *Id.* § 361 cmt. a (emphasis added); *see also id.* § 332 cmt. a ("The rules for ascertaining the meaning of the words of a contract, *not being a question of the Conflict of Laws*, are considered in the Restatement of Contracts . . . ." (emphasis added)).

everywhere shared the commitment to common principles of interpretation and construction (conveniently summarized in the Restatement of Contracts) that would prevent conflicts from arising and obviate the need for rules for how to resolve them.

Nevertheless, the drafters were aware of possible conflicts among doctrines of interpretation and construction. Early drafts addressed such conflicts and proposed a separate section (Topic V) devoted to interpretation.[95] None of the proposed rules applied forum law.[96] Vacillating between applying the law of the place of contracting and the law of the drafter's domicile, the proposed rules met with some objection; within two months a revision eliminated all rules for interpretation and adopted the position expressed in the official version that interpretation is a matter of contract law, not conflict of laws.[97]

95. *See* JOSEPH H. BEALE, CONFIDENTIAL: THE AMERICAN LAW INSTITUTE: CONFLICT OF LAWS RESTATEMENT § 397 (draft submitted for consideration at meeting scheduled for May 15-18, 1927) [hereinafter MAY 1927 RESTATEMENT DRAFT] (directing application of law of place of domicile of person providing printed form), § 398 (directing application of law of place of domicile of person filling in blanks on printed form), § 399 (directing application of usage of place of contracting when contract was in the common language of the contracting parties), *microformed on* C. L. No. 18-R 4-11-27 (Heinonline).

96. *See id,* §§ 397-99.

97. JOSEPH H. BEALE, CONFIDENTIAL: THE AMERICAN LAW INSTITUTE: CONFLICT OF LAWS RESTATEMENT § 353 cmt. a (draft submitted for consideration at meeting scheduled for July 25, 1927) [hereinafter JULY 1927 RESTATEMENT DRAFT] ("The meaning of words of a contract, not being a question of the Conflict of Laws, is considered in the Restatement of Contracts."), *microformed on* C. L. No. 19-R 7-1-27 (Heinonline*).* It should be emphasized that this rule preceded any formal rules governing rules of construction, and the drafters in 1927 evidently thought it disposed of conflicts of interpretation. The drafters were aware, however, of the potential distinction between interpretation and construction, because they had deployed the distinction for wills in 1926. *Cf.* JOSEPH H. BEALE & AUSTIN W. SCOTT, CONFIDENTIAL: THE AMERICAN LAW INSTITUTE: CONFLICT OF LAWS RESTATEMENT § 41 (draft submitted for consideration at meeting scheduled for July 22, 1926) [hereinafter JULY 1926 RESTATEMENT DRAFT] ("The construction of a will of land, that is, the determination of what the effect of a provision in the will [is] upon land, is determined by the law of the state where the land is; but in interpreting a particular passage in the will, the usage of the testator's domicil is applied in the absence of controlling circumstances to the contrary."), *microformed on* C. L. No. 19-R (Heinonline).

The drafters in November 1926 did not, however, consistently distinguish the use of "interpretation" from "construction." *See* JOSEPH H. BEALE, CONFIDENTIAL: THE AMERICAN LAW INSTITUTE: CONFLICT OF LAWS RESTATEMENT § 228 (draft submitted for consideration at meeting scheduled for Nov. 25, 1926) [hereinafter NOVEMBER 1926 RESTATEMENT DRAFT] ("(1) The interpretation of an instrument of conveyance, in so far as such interpretation affects the title of the thing conveyed, is determined by the law of the situs of the thing. (2) The interpretation of an instrument of conveyance, in so far as [it] does not affect the title of the thing conveyed, is, in the absence of controlling circumstances to the contrary, determined in accordance with the usage at the domicil of the person who makes the conveyance."), *microformed on* C. L. No. 19-R

In the absence of choice of law rules, interpretation and construction might both seem to be governed by forum law. Yet in its final form, the First Restatement equivocated, as evidenced by the claim that the "legal effect" of language (once properly interpreted) was governed by the law of the place of contracting or performance.[98] An illustration demonstrated the application of substantive choice of law rules to matters of construction or interpretation: "A agrees to sell and B to buy goods to be packed in state Y in the presence of two adults."[99] Designed to demonstrate the application of the law of the place of performance to details of performance, the drafters proposed that state Y law governed the meaning of "adult."[100] Yet the example does not present a case involving the scope of an obligation that arises by operation of law in the absence of the parties' agreement.[101] On the contrary, it presents a case where the courts are called upon either to ascertain the meaning that the parties ascribed to the word "adults" or to assign a meaning to the word "adults" irrespective of the parties' intent. In either event, the court is called upon to construe or interpret the language of the contract. The illustration thus indicates how the First Restatement's drafters worked to avoid characterizing an issue as one of contract construction (for which they offered no rules) and to classify the issue as one of the scope of performance (for which they provided a rule). Ironically, the proposed solution duplicates Story's old example of conflicting meanings of "pounds" and even applies Story's rule,[102] which the final text of the First Restatement had refused to restate as black letter law.

3. Construction Avoidance Devices

a. Parole Evidence Rule

The First Restatement's formal rules addressed only one issue of contract construction, the parole evidence rule:

> When a contract is integrated in a writing by the law of the place of contracting, no variation of the writing can be shown in another

(Heinonline).

This constituted a radical change from the prior draft that proposed: "The interpretation of an instrument of conveyance . . . is, in the absence of controlling circumstances to the contrary, determined in accordance with the usage at the domicil of the person who makes the conveyance." JULY 1926 RESTATEMENT DRAFT, *supra* note 97, § 9.

98. FIRST RESTATEMENT, *supra* note 9, § 361 cmt. a.

99. *Id.* § 361 illus. 2.

100. *Id.*

101. Such a case is illustrated by the preceding illustration where the law of the place of performance governs the method of inspection where the parties have not otherwise specified the manner of inspection. *Id.* § 361 illus. 1.

102. *See supra* text accompanying notes 32-33.

> state which could not be shown in a court in the place of contracting under the law of that state, whatever the law of the other state as to integrated contracts.[103]

This rule treats a common matter of construction as "substantive," governed by the law of the place of contracting, and declares forum rules of construction, even when characterized as rules of evidence, to be "immaterial."[104]

Because the parole evidence rule provides the First Restatement's only treatment of contract construction, it is tempting to extrapolate from it a more general policy that matters of construction should be governed by reference to the law of the place of contracting. But this is not warranted by either the text or principles of the First Restatement. On the contrary, the First Restatement limits the law of the place of contracting to the parole evidence rule; the rule is limited by its terms to fully integrated contracts; and neither the rule nor the comments suggest that it may be given any broader application.[105] Moreover, the rule is itself anomalous in two ways. First, it avoids the normal practice of applying forum law to the question of characterization, applying instead the law of the place of contracting to the issue of whether a contract is integrated.[106] Second, the rule is an exception to the more general rule that applies forum law to the admissibility of oral evidence.[107] In light of the lack of strong judicial authority, the First Restatement's treatment of the parole evidence rule probably reflected the drafters' preference for enforcing integrated contracts.[108]

b. Statutes of Frauds

The First Restatement distinguished between two different kinds of statutes of frauds: "A statute of frauds may prescribe a rule of procedure for the courts of a state, or it may affect the formal validity of contracts made in that state."[109] The Restatement required a contract to satisfy the statute of frauds of the place of contracting

103. FIRST RESTATEMENT, *supra* note 9, § 599.

104. *Id.* § 599 cmt. b. ("If . . . a contract is not integrated by the law of the place of contracting, the rules determining what facts can be proved by oral evidence are determined by law of the forum.").

105. *See id.*

106. *See id.*

107. "Subject to the rule stated in § 599, the law of the forum determines whether a certain fact can be proved by oral evidence." *Id.* § 598. Refusal to apply forum law to integrated contracts stands in sharp contrast with surrounding rules that direct application of forum law to matters of procedure and proof. *See id.* §§ 584-599, 600-06.

108. *See id.* § 599 cmt. a (citing RESTATEMENT (FIRST) OF CONTRACTS § 228 (1932)).

109. *Id.* § 598 cmt. a. (citation omitted); *see also id.* § 602 cmts. a-b.

when that statute was substantive.[110] It also required the contract to satisfy the forum's statute of frauds when that statute was procedural.[111]

The First Restatement's approach requires courts to undertake the notoriously difficult task of classifying a statute of frauds as substantive, procedural, or both substantive and procedural.[112] Such a classification is not meaningfully assisted by domestic legislative or judicial authority. Its rules exhibit a preference for enforcing statutes of frauds (whenever they are either substantive at the place of contracting or procedural at the place of litigation), and this preference stands in tension with the trend of common law decisions to construe statutes of frauds narrowly.

4. Words in Deeds and Wills of Land

In sharp contrast to its treatment of contracts, the First Restatement promulgated rules of general application to govern interpretation and construction conflicts involving conveyances of interests in real property. Specific rules apply situs law to govern the construction of a deed or will of land when the words have a legal effect regardless of intent.[113] For example, the meaning of a conveyance "to A and his heirs" is governed by the law of the place where the land is located when under that law the language conveys a fee simple absolute regardless of the grantor's actual intention.[114] Situs law likewise applies to the meaning of words in a conveyance or will of land when, under situs law, those words "have a given operative effect unless a contrary intent is shown by admissible evidence."[115]

The application of the legal effect of language ascribed by situs law deviates from the First Restatement's general rule that forum

110. *Id.* § 334(b) ("The law of the place of contracting determines the formalities required for making a contract."). The law of the place of contracting will in theory also apply to determine if the failure to reduce an agreement to writing provides a defense to a promise. *Cf. id.* § 347 (providing that "[t]he law of the place of contracting determines whether a promise is void, or voidable" for any legal or equitable defense but not considering classification of statute of frauds as a defense).

111. *Id.* §§ 598, 602. The comments explicitly provide that a forum procedural requirement of a writing must be satisfied even when the place of contract required no writing. *Id.* § 602 cmt. a. This is consistent with the general application of forum law of evidence. The Restatement also makes clear that forum procedural requirements do not alter substantive requirements for a valid claim imposed by applicable foreign law. *See id.* § 595 cmt. a, § 600 Topic 3 scope note.

112. *Id.* § 598 cmt. a (discussing how forum statute of frauds may be both substantive and procedural).

113. *Id.* §§ 214(1), 251(1).

114. *Id.* § 214 cmt. a, subsec. 1.

115. *Id.* §§ 214(2), 251(2).

law applies to presumptions and inferences.[116] The comments do not explain this deviation, though an illustration suggests a reason for it. In the illustration, a testator devises land to his spouse. Under the law of the decedent's domicile, such a devise is presumed to be in addition to her dower interest. Under the law of the place where the land is located, such a devise replaces her dower interest.[117] The First Restatement dictates that the conveyance is governed by the law of the place where the land is located, and, absent additional evidence of intent, the surviving spouse must elect between the devise and her dower rights.[118] The presumption in this illustration provides more than just a guide to the testator's intent. It advances substantive policies about the distribution of land over which situs jurisdiction has exclusive concern.[119]

Most matters of interpretation or construction involving wills and conveyances of land fall under a residual third rule that applies the law of the drafter's domicile.[120] Although formulated as a residual rule in the official version of the Restatement, initial drafts had proposed this as the general rule[121] and insisted that it was not a rule of law but "merely a canon of interpretation . . . . based upon the probability that a man speaks the language of his home."[122] This explanation was retained in the final commentary.[123]

116. *Id.* § 595(2).

117. *Id.* § 214 illus. 1.

118. *See id.* § 214(2).

119. The First Restatement's promotion of situs law was partly a function of its assumption that the situs had exclusive jurisdiction. FIRST RESTATEMENT, *supra* note 9, §§ 48, 101. It can be questioned on at least two grounds. First, as a matter of policy, the surviving spouse's domicile arguably has greater interest and will experience the immediate consequences of a decision involving the disposition of assets, including dower rights in real property. Second, the traditional rules can lead to the same will being governed by the law of different states with respect to real property and personal property. *E.g.*, Craig v. Carrigo, 12 S.W.3d 229, 233, 237 n.2 (Ark. 2000).

120. FIRST RESTATEMENT, *supra* note 9, § 214(3) ("The meaning of words used in an instrument of conveyance of an interest in land which, by the law of the state where the land is, are accorded neither of the effects described in Subsections (1) and (2), is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicil of the conveyor at the time of the conveyance."). Although the black letter rule indicates that intent is determined by domicile at the time of the conveyance, the comments make clear that the relevant time is when the language is used. *Id.* § 214 cmts., subs. 1-3. The rule for wills provides that the meaning is construed "in accordance with usage at the domicil of the testator at the time when the will was made" (rather than domicile at death). *Id.* § 251(3).

121. NOVEMBER 1926 RESTATEMENT DRAFT, *supra* note 97, § 228(2) ("The interpretation of an instrument of conveyance . . . is, in the absence of controlling circumstances to the contrary, determined in accordance with the usage at the domicil of the person who makes the conveyance.").

122. *Id.* § 228 cmt. b.

123. FIRST RESTATEMENT, *supra* note 9, § 214 cmt., subsec. 3 ("Subsection (3) states

The rule imperfectly effectuates party intent. By incorporating not just the meaning of language from the domicile but also rules of construction, the rule will frustrate party intent whenever the home state's rules of construction frustrate intent.

5. Words in Conveyances of Personal Property

Although it included no general rule for construing conveyances of personal property and trusts,[124] the First Restatement probably meant for such issues to be governed by the law of the domicile of the person who used the language at the time he or she used the language. This rule is consistent with its general "canon of construction,"[125] and it informs three specific rules governing wills of personal property,[126] trusts of personal property,[127] and powers of appointment of personal property.[128]

a canon of interpretation, applicable to determine the meaning of words when the court is in doubt. It is based upon the probability that a man speaks the language of his home. Thus, where words are ambiguous, or are susceptible of more than one meaning, it becomes necessary to determine which meaning is to be attached thereto. In the absence of controlling circumstances to the contrary, the meaning of such words is determined in accordance with the usage at the domicil of the person who used the language in question at the time of its use.").

124. This gap resulted when the original rule, which applied to all conveyances, was modified to apply solely to conveyances of interests in land.

125. *See supra* note 95.

126. FIRST RESTATEMENT, *supra* note 9, § 308 ("The meaning of words used in a will of movables, in the absence of controlling circumstances to the contrary, is determined in accordance with the usage at the domicil of the testator at the time of making the will."). Possibly the only example of "controlling circumstances to the contrary," in the First Restatement, is in the comment to this section which provides that an interpretation of the will by the court of the decedent's domicile will be followed by other courts. *Id.* § 308 cmt. b.

127. *Id.* § 296 ("The meaning of the words used in an instrument creating a trust of movables is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicil of the settlor of the trust at the time of the execution of the instrument which created it.").

128. *Id.* § 285 ("The meaning of words used in a power of appointment of movables is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the state of the domicil of the creator of the power at the time of the execution of the instrument which created it.").

These rules tracked the proposed rules of interpretation in the earliest drafts. *See* JULY 1926 RESTATEMENT DRAFT, *supra* note 97, §§ 74 (interpretation of power of appointment governed by usage of the state of domicile of person creating the power), 84 (interpretation of trust of personal property governed by usage of domicile of settlor).

V. THE SECOND RESTATEMENT OF CONFLICT OF LAWS

A. General Approach

The Second Restatement of Conflicts departed from the First Restatement in promulgating rules that empowered parties to select the law to govern their contracts and other consensual transactions.[129] Supported by growing statutory[130] and case law authority,[131] the Second Restatement's endorsement of the principle of party autonomy gave additional impetus to "the most widely accepted private international rule of our time."[132] In the absence of an effective choice of law, the Second Restatement adopted a variety of rules that typically selected the law of the state with the most significant relationship to the parties and transaction.[133]

B. Early Drafts and the Elimination of Rules Governing Interpretation

Initial drafts of the Second Restatement proposed a bold and possibly unintended departure from the First Restatement's

129. SECOND RESTATEMENT, *supra* note 10, §§ 187(1) (contracts), 204 (construction of contracts), 224(1) (conveyances of land), 240(1) (wills devising land), 244 (conveyances of personal property), 264(1) (wills of personal property), 268-73, 277 (trusts). Hay and his colleagues identify section 187 as the single most influential provision of the Second Restatement. HAY ET AL., *supra* note 3, at 1088 (quoting S. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE INTERNATIONAL CASES AND MATERIALS 338 (2d ed. 2003)); *see also* SPILLENGER, *supra* note 3, at 127 (identifying section 187 as the provision readers are most likely to encounter).

130. The Uniform Commercial Code permitted parties to choose law to govern their agreement when the transaction bore a "reasonable relation" to the state or nation whose law was chosen. U.C.C. § 1-105 (1952).

131. *See supra* notes 68-78 and accompanying text for early cases. By the 1950s, cases supported the conclusion that party choice of law would be enforced, specifically on matters of interpretation. *See* E.H. Schopler, *Annotation, Conflict of Laws as to the Usage and Custom, With Respect to Interpretation or Performance of a Contract*, 60 A.L.R. 2d 467, § 4, at 470 (1959). Nevertheless, the (three) cases discussed for interpretation enforced the express language of the contracts and consulted chosen law only to resolve ambiguity. *Id.*

132. Russel J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984); *see also* Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws,* 41 VAND. J. TRANSNAT'L L. 381, 385 (2008). ("[O]n a global level, the true revolution has been the growing acceptance of party autonomy as a way to determine the applicable law. Within the last decades, party autonomy has become the one principle in conflict of laws that is followed by almost all jurisdictions."). The certainty produced by the formal enforcement of choice of law agreements provides an important exception to the lack of uniformity and predictability that characterize modern choice of law rules. *See generally* HAY ET AL., *supra* note 3, at 121-28 (discussing failure of modern approaches to produce coherent system).

133. These rules are considered in more detail, *infra* notes 171 (contracts), 174 (wills), 173 (trusts), and 172 (conveyances).

treatment of interpretation and construction. The 1957 draft treated interpretation and construction the same way and subordinated both to the substantive law that governed the validity of a conveyance,[134] will,[135] or trust.[136]

Drafts of the Second Restatement proposed changes to the choice rules for real property,[137] though it is unclear whether the drafters

134. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 214 (Tentative Draft No. 5, 1959) ("Words used in an instrument of conveyance of an interest in land are construed or given legal effect in accordance with the law of the state where the land is."). There is tension between the Second Restatement's proposed rule and its commentary, which introduces the distinction between three sorts of effects given to language: 1) "legal consequences irrespective of the meaning intended by the parties," 2) interpretation giving the meaning to words intended by the parties, and 3) construction, the gap-filling process of establishing meaning by assigning intent in the absence of sufficient evidence of actual intent. *Id.* § 214 cmts. a-d. The draft commentary acknowledged that some authorities called for the application of the law of the party's domicile rather than situs law. *Id.* § 214 cmt. d.

Further, at section 254a the Restatement provides that "[a]n instrument of conveyance of an interest in a chattel [is] construed in accordance with the law of the state where the chattel was at the time of the conveyance." *Id.* § 254b. Commentary to this proposed rule expresses the drafters' initial assumption that interpretation should be governed not by party intent but by the substantive law applicable to the validity of the instrument. *Cf. id.* § 254b cmt. b ("[T]he law of the state where the chattel was at the time of the conveyance determines which meaning should be chosen" where a word has different meanings in one or more of the states related to the conveyance.).

135. *Id.* § 251 ("[A] devise of an interest in land [is] construed or given legal effect in accordance with the law of the state where the land is."); *id.* § 308(1) ("[A] will of interests in movables is construed in accordance with the local law of the state designated for this purpose by the testator in the will.").

Commentary motivating the rule for movables is especially interesting. It first emphasized the unimportance of the rule "since methods and cannons of interpreting or construing a will of movables will rarely differ materially from state to state." *Id.* § 308 cmt. a. It then justified selecting the testator's domicile but did so based not on his or her domicile at death but rather his or her domicile at the time of the usage of the words requiring construction. *Id.* § 308 cmt. b. Finally, in illustrations, the commentary indicated, contrary to the proposed rule of law, that the rules of construction of the place of execution would apply over the place where the testator died domiciled when the two places were not the same. *Id.* § 308 illus. 1-2.

136. *Id.* § 296 (interpretation and construction of trusts governed by law governing substantive validity of trust); *see also id.* § 285 (interpretation and construction of power of appointment of interest in movables governed by law of place where chattel or document was located or where donor was domiciled at death).

137. The early draft rule for conveyances and wills of land applied the law of the place of the land. *See infra* note 148. This deviated from section 251 of the First Restatement, which applied the law where the decedent died domiciled to most matters of construction. *See* Lehmann, *supra* note 132, at 385-86. The final version adopted a new rule that applied the whole law of the situs. SECOND RESTATEMENT, *supra* note 10, § 224 (providing conveyance to be construed according to law designated in instrument, and, absent such designation, "in accordance with the rules of construction that would be applied by the courts of the situs."), *id.* § 240 (providing will to be construed according to law designated in will and, absent such designation,

recognized that this deviated from the First Restatement's approach to matters of interpretation and construction. The drafters were initially unaware that applying choice of law rules that governed substantive issues to interpretation could frustrate the intent of the parties. The drafters became aware of this problem by 1959 when, while continuing to treat interpretation as a substantive matter for conveyances of land[138] and personal property,[139] they modified the proposed rules for wills,[140] signaling for the first time that interpretation should be governed by forum law.

The revised rule for wills of personal property permitted testators to designate a law to govern construction in their will; in the absence of such a designation it generally applied the law of the place where the testator died domiciled.[141] Comments emphasized, however, that these rules of construction did not apply to interpretation, which remained governed by forum law.[142]

When the drafters in 1960 addressed contract interpretation and construction, they repeated their solution for wills. They permitted contracting parties to designate the law to govern construction, and,

"in accordance with the rules of construction that would be applied by the courts of the situs").

The choice of situs whole law was probably motivated less by any need for uniformity than by the drafter's desire to avoid selecting between the application of situs law or the law of the drafter's domicile (each of which had some authority). The compromise choice of situs whole law in fact provides no guidance for the situs courts, which may either apply their own law or the law of the drafter's domicile. None of the cases, articles or uniform codes cited in the original Reporter's Note to sections 224 or 240 supported the application of situs whole law.

138. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 214 (Tentative Draft No. 5, 1959) ("Words used in an instrument of conveyance of an interest in land are construed or given legal effect in accordance with the law of the state where the land is.").

139. *Id.* § 254a ("Words used in an instrument of conveyance of an interest in a chattel are construed in accordance with the law of the state where the chattel was at the time of the conveyance.").

140. *Id.* § 251 ("Words used in a devise of an interest in land are construed or given legal effect in accordance with the law of the state where the land is."); *id.* § 308 (dropping reference to interpretation).

141. *Id.* § 308 ("(1) A will of interests in movables is construed in accordance with the local law of the state designated for this purpose by the testator in the will. (2) In the absence of such a designation, the will is construed in accordance with the law governing the validity and effect of the will under the rule of § 306 [generally the state where the testator died domiciled].").

142. *Id.* § 308 cmt. a ("The rule of this Section is applicable only when it is impossible to determine from the evidence what were the actual intentions of the testator."). The process of determining the testator's intention is a function of forum law; it "is called interpretation [and] does not present Conflict of Laws questions" *Id.* (internal citation omitted). This commentary, explicating the elimination of interpretation, will survive into the final version of the Second Restatement as the sole vestige of the treatment of conflicts of interpretation. *See infra* notes 148, 179.

absent such a designation, they provided that most constructions issues were governed by the same law that would govern the substantive issue of validity.[143] For the construction of matters involving details of performance, they prescribed the application of the law of the place of performance.[144] The Second Restatement thus establishes a system-wide distinction between interpretation (for which it ultimately provides no formal rules) and construction (for which it applies a variety of subject-specific rules).[145]

C. Contracts

1. Interpretation vs. Construction

The Second Restatement creates an important distinction between the process of interpretation, designed to determine the intent of the contracting parties, and the process of construction, designed to assign legal meaning to language when intent is indeterminate.[146] The introductory clause to section 204 makes plain that construction rules apply only "[w]hen the meaning which the parties intended to convey by words used in a contract cannot

143. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332a-b (Tentative Draft No. 9, 1960).

144. Id. § 334e ("(1) A contract is construed in accordance with the local law of the state chosen for this purpose by the parties. (2) In the absence of such a choice, the contract is construed in accordance with the local law selected by the application of §§ 332-332b, except as to minute details of performance.")

The final version would drop the black letter rule for details of performance, though it retained the exception in commentary and illustrations without the authority of any formal rule. SECOND RESTATEMENT, *supra* note 10, § 204 cmt. c ("In the absence of satisfactory evidence of what the parties actually intended, a contract will be construed, insofar as it relates to details of performance, in accordance with the local law of the state where performance is to take place.") (citation omitted).

145. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 334e cmt. a (Tentative Draft No. 6, 1960) ("The rule of this Section is applicable only where it is impossible to determine what the parties meant by the language used in the contract."). A court is directed to apply forum law of evidence and presumptions to determine actual intent: "This process, which is called interpretation, does not present Conflict of Laws questions." *Id.* (citation omitted).

146. The distinction between interpretation and construction is discussed more fully. SECOND RESTATEMENT, *supra* note 10, § 224 cmts. c-d. In limiting party choice to situations where intent "cannot satisfactorily be ascertained," *id.* § 204, the Second Restatement adopts technical language from contract law that excludes interpretation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 200 (1979) (defining interpretation as process of "ascertain[ing] . . . meaning").

The Restatement (Second) of Contracts, however, more broadly conceives of interpretation as applicable to "manifest" intent and discusses various rules of construction (or interpretation) that assign putative intent, some of which serve purposes of equalizing bargaining and deterring overreaching. One example is the rule requiring construction against the drafter. *Id.* § 206.

satisfactorily be ascertained."[147] This distinction assigns a limited role to construction:

> The rule of this Section [governing conflicts of "construction"] 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.[148]

In other words, construction rules apply only in unusual cases where the forum court cannot determine the intent of the parties and where the language is given a different meaning under the rules of construction found in forum law and those of some other law that may apply.[149]

For the construction of contracts, official comments in the Second Restatement make two further distinctions. First, they distinguish between the construction of substantive obligations and the construction of details of performance.[150] Second, they address "rare situations" where the law assigns a fixed meaning to words in a contract regardless of the intent of the parties. Although the express language of section 204 prescribes that a rule of construction will apply only when intent cannot be ascertained, the commentator proposed that the forum should disregard intent and give the words the fixed meaning assigned under the law governing construction.[151]

147. SECOND RESTATEMENT, *supra* note 10, § 204.

148. *Id.* § 204 cmt. a.

149. The operation of the Second Restatement rules may be considered by applying them to the illustration from the First Restatement where parties specified that inspection must occur in the presence of two "adults." FIRST RESTATEMENT, *supra* note 9, § 361 illus. 2. According to the Second Restatement, if the parties' actual intent is discernable, it should govern. SECOND RESTATEMENT, *supra* note 10, § 204 cmt. a.

150. For example, in a contract governed by New York law for the payment of $100 in Canada, payment must be made in an amount equivalent to 100 U.S. dollars because the meaning of "dollars" is a substantive obligation and governed by New York law. SECOND RESTATEMENT, *supra* note 10, § 206 illus. 6. But the performance can be satisfied by tendering the appropriate equivalent in Canadian dollars since the method of performance is governed by the place of performance. *Id.* This illustration rewards close study for what it reveals about the drafters' failure to appreciate their own distinction between interpretation and construction. It does not explain whether the meaning of dollars is determined by the parties' intention or by a rule of New York law that governs in the absence of intent.

151. *Id.* § 204 cmt. d. The commentator offers no authority for this proposed rule, does not see that it conflicts with section 204, and appears motivated chiefly by the goal of making the treatment of contract construction comparable to the treatment of

2. Rules of Construction Chosen by Private Agreement

The Second Restatement provides that words in a contract "will be construed . . . in accordance with the local law of the state chosen by the parties."[152] The rule and commentary make clear that chosen law will apply to matters of construction regardless of whether the selection is arbitrary or conflicts with policies of other jurisdictions.[153]

The formal rule can yield uncertain and paradoxical results when the rule of construction under chosen law frustrates the intentions of the parties or when the chosen law advances a policy objective of a foreign state with no connection with the dispute or no interest in applying its law. Suppose that an escrow agreement designates Edna, who is not a citizen of Tralfamadore, as escrow agent and elsewhere provides the agreement shall be construed according to the law of Tralfamadore. Suppose further that the law of Tralfamadore requires all escrow agents to be citizens of Tralfamadore.[154]

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language in conveyances. *See infra* text accompanying note 168 (discussing section 224). This incoherence is an artifact of the drafting history and the incomplete correction of early drafts that applied substantive choice rules to matters of interpretation and construction.

152. SECOND RESTATEMENT, *supra* note 10 § 204(a). This specific provision is widely neglected by courts. Only a handful of reported decisions even refer to it in passing. *See* Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428 (10th Cir. 2006); Clayman v. Goodman Props., Inc., 518 F.2d 1026, 1030 n.22 (D.C. Cir. 1973); Pearce v. E.F. Hutton Grp., Inc., 664 F. Supp. 1490, 1495 (D.D.C. 1987); Educ. Elecs., Inc. v. Brookline Trust Co., 315 N.E.2d 894, 895 (Mass. App. Ct. 1974); Davis v. State Farm Mut. Auto. Ins. Co., 507 P.2d 9, 10 (Or. 1973); Concord Commc'ns. v. H.W. Fuchs Agency, Inc., 1979 Wisc. App. LEXIS 3321 at *7 (Wisc. Ct. App. 1979). Most courts apply section 187 to matters of construction—and even interpretation. *See*, *e.g.*, Nedlloyd Lines B.V. v. Super. Ct., 227 Cal. Rptr. 822, 827 (Cal. Ct. App. 1991). A number of scholars likewise neglect section 204(a) and discuss only section 187 for matters of construction and interpretation. RICHMAN & REYNOLDS, *supra* note 2, at 223; ROOSEVELT, *supra* note 2, at 86.

153. *See infra* notes 156-57 (discussing limits on valid choice of law in contract). *See* SECOND RESTATEMENT, *supra* note 10, § 204 cmt. b ("If . . . the law chosen by the parties is not applied to govern issues involving the validity of the contract, this [chosen] law will nevertheless be applied to determine questions of construction."); *see generally* HAY ET. AL, *supra* note 3, at 1086-88. The authors expressed this more forcefully in the previous edition. *Cf.* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 956 (4th ed. 2004) ("When the parties choose a law solely for the purpose of construing or interpreting the items of their contract, their choice is not restricted."); *see also* Spillenger, *supra* note 3, at 128 (characterizing all rules of interpretation as default rules that parties may displace by private agreement).

154. The comment states that "legal effect" rules that prescribe fixed meanings regardless of intent are selected by the general choice of law provisions in sections 187 and 188, not section 204. SECOND RESTATEMENT, *supra* note 10, § 204 cmt. d. Sections 187 and 188 limit party choice of law, unlike section 204. The choice would not be valid under section 187(2) in the absence of any substantial relationship or other reasonable

Competing state interests would not usually be particularly strong inasmuch as rules of construction are designed to effectuate intent, and the parties could have avoided the need for construction by expressly stating their intent. Nevertheless, a state may impose the requirement of an express statement of intent—or even require its statement in a particular form—as a means of securing substantive goals. For example, a requirement that a waiver of jurisdiction must be made explicitly (or in bold print of a particular font size) may serve important policies of protecting consumers from being maneuvered into distant, inconvenient forums by the use of ambiguous language coupled with a choice of law provision.[155]

3. Other Matters Governed by Law Chosen by Private Agreement

Section 187 provides: "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."[156] Even when the issue could not have been resolved by private agreement, the Second Restatement applies chosen law except in two situations. The first exception occurs when the chosen state has "no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."[157] The second occurs when the chosen state's law is "contrary to a fundamental policy of

basis for the choice.

The limitation on party choice for the purpose of preventing its unintended frustration of party intent is consistent with the more familiar doctrine of the Second Restatement that invalidates chosen law when it (unintentionally) invalidates the contract altogether. *See id.* § 187 cmt. e ("On occasion, the parties may choose a law that would declare the contract invalid. In such situations, the chosen law will not be applied by reason of the parties' choice. 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 [in the absence of party choice], this law will be applied even when it invalidates the contract.") (citation omitted).

155. *See* TH Agric. & Nutrition, L.L.C. v. Ace European Grp. Ltd., 416 F. Supp. 2d 1054, 1074-75 (D. Kan. 2006), discussed *infra* text at notes 253-60.

156. SECOND RESTATEMENT, *supra* note 10, § 187(1). This rule covers much more than rules of construction. It provides additional terms and obligations (possibly unintended by the parties) furnished by chosen law so long as the parties could have written such terms into the contract. For example, the compensation of a trustee will be governed by the rate provided by chosen law if it is a rate that the parties could have specified in the contract. *Id.* § 187 illus. 4.

157. *Id.* § 187(2)(a).

[another] state,"[158] and the other state has both the "most significant relationship to the transaction and the parties"[159] and a "materially greater interest" in application of its law to the issue.[160] The exceptions prevent the application of chosen law when the state chosen is completely irrational and when chosen law frustrates policies of a state with a much stronger interest in the case.

4. Rules of Construction When Parties Have Not Chosen Law

When parties have not made a choice of law, the Second Restatement provides that contractual language will be construed in accordance with "the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and parties under the principles stated in § 6."[161] Section 6 principles are: "the needs of the interstate and international systems"; the "policies of the forum [and] other interested states"; "the protection of justified expectations; basic policies underlying the particular field of law"; "certainty, predictability and uniformity"; and the "ease in determination and application of the law."[162] Contacts to be taken into account in making this choice are: "the place of contracting"; the place of the "negotiation [and performance] of the contract"; "the location of the subject matter of the contract"; and "the domicile, residence, nationality, place of corporation and place of business of the parties."[163] The Second Restatement provides that when the place of negotiating and performance are the same, that place's law will "usually" be applied[164] and that the construction of details of performance will be governed by the place of performance.[165]

The Second Restatement rules are subject to two sorts of objections. First, their application is uncertain because of the indeterminate values ascribed to contacts and policies.[166] Second, the application of the state with the most significant relationship has been challenged on the ground that the rule does not assure

158. *Id.* § 187(2)(b).

159. *Id.* § 188(1).

160. *Id.* § 187(2)(b).

161. SECOND RESTATEMENT, *supra* note 10, §§ 188(1), 204(b).

162. *Id.* § 6(2)(a)-(g).

163. *Id.* § 188(2)(a)-(e).

164. *Id.* § 188(3).

165. *Id.* § 204 cmt. c.

166. *See, e.g.*, HAY ET AL., *supra* note 3, at 406 (describing reference to most significant relationship as "inherently vague and uncertain"); WEINTRAUB, *supra* note 2, at 406 (discussing impossibility of evaluating significant contacts without first understanding policies behind laws in conflict).

uniformity of outcomes.[167]

5. Construction Avoidance Devices

The Second Restatement follows the First Restatement in treating the parole evidence rule as substantive.[168] The Second Restatement simplifies the First Restatement's approach to statutes of frauds, treating all statutes of frauds as substantive and governed by the general choice of law rules for contracts.[169] But it provides that contracts will be valid when they substantially satisfy the formal requirements of the law of the place of execution[170] or the law the parties expected to apply.[171]

167. Professor Weintraub questions the desirability of applying the contract law of the state with the most significant relationship to matters of construction. Weintraub emphasizes that a forum should first determine whether the forum state has an interest in applying its own gap-filling rules of construction. If not, there is a false conflict in most cases, and the forum should apply the foreign rule of construction. (He proposes that in true conflicts between two foreign states' rules of construction the forum should apply forum law as a matter of convenience.) WEINTRAUB, *supra* note 2, at 534-37.

The Second Restatement's reference to state policies arguably supports the same result for false conflicts. But Weintraub objects that the Second Restatement reaches the wrong result in some true conflicts. *Id.* In such cases, the goal is uniformity and discouraging the overzealous application of forum rules that would encourage forum shopping. This is achieved, not by applying the principles of the Second Restatement, but rather by applying the whole law that the foreign state would apply in the same case. *Id.* Weintraub provides an important qualification: states should avoid applying anachronistic rules of construction. *Id.*

168. SECOND RESTATEMENT, *supra* note 10, § 140 ("Whether a contract is integrated in a writing and, if so, the effects of integration are determined by the local law of the state selected by the application of the rules of §§ 187-188."). As the comments explain, "Rules which determine when a contract is integrated should be determined by the law which governs the contract. Such rules are not concerned primarily with judicial administration . . . and may affect substantially the obligations of the parties under the contract." *Id.* § 140 cmt. c.

169. *Id.* § 141 ("Whether a contract must be in writing, or evidenced by a writing, in order to be enforceable is determined by the law selected by application of the rules of §§ 187-188."). The rule was meant to cover statutes of frauds that were construed to impose requirements for a valid contract as well as those that were construed as evidentiary. *Id.* § 141 cmt. b ("[A]rguments in favor of a substantive classification are the stronger and the more persuasive."). A separate rule addressed formalities required for a valid contract. *See id.* § 199 ("The formalities required to make a valid contract are determined by the law selected by application of the rules of §§ 187-188.").

170. *Id.* § 199(2) ("Formalities which meet the requirements of the place where the parties execute the contract will usually be acceptable."). This "usually be acceptable" rule is not formally congruent with the general rule in the immediate preceding subsection. It is supported in comments by the purpose of enforcing party expectations and the assumption that parties usually expect the law of the place of execution to apply and might rely on it. *Id.* § 199 cmt. c.

171. *Id.* § 199 cmt. c ("A contract which does not satisfy the requirements with respect to formalities of the state of execution may nevertheless be upheld by

D. Words in Conveyances, Wills, and Trusts

The Second Restatement provides that the construction of language in conveyances,[172] trusts,[173] and wills[174] is governed by the law chosen by parties. If parties have not designated a law to apply for conveyances, wills, and trusts of land, then construction is governed by the rules of construction applied by the courts of the situs.[175] If parties have not designated a law to apply for wills of personal property, then construction is governed by the law of the place where the testator died domiciled.[176] For trusts of personal property that contain no choice of law provision, construction is governed for the matters of administration by the local law that

application of the local law of another state. Such a result would be supported by the choice-of-law policy favoring protection of the justified expectations of the parties."). In other words, formalities satisfying the law of the place of execution will suffice because the parties expected that law to apply, and, when formalities do not satisfy that place's law, they may nevertheless suffice because the parties expected the contract to be enforceable. *See id.* ("In any event, a contract which satisfies the requirements with respect to formalities of the state of execution will not be declared invalid by application of the local law of another state in situations where the requirements of the states involved differ only in matters of detail."). This rule should apply with equal force to a contract that satisfies the formalities of the law chosen in the contract, because the underlying justification for validating law under the place of execution was party expectation.

172. *Id.* § 224(1) ("An instrument of conveyance of an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the instrument."). A drafting blunder probably explains the Second Restatement's omission of a specific rule for the construction of conveyances of chattels. But there is no doubt the drafters expected chosen law to apply. *Cf. id.* § 244(2) (implicitly applying chosen law to validity and effect of conveyance of personal property); § 244 cmt. c (observing that local law of the state will apply because the parties likely intended it to govern subject to qualifications in section 187).

173. *Id.* §§ 268(1) ("A will or other instrument creating a trust of interests in movables is construed in accordance with the rules of construction of the state designated for this purpose in the instrument."), 277(1) ("A will or other instrument creating a trust of an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the instrument.").

174. SECOND RESTATEMENT, *supra* note 10, §§ 240(1) ("A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will."), 264(1) ("A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will.").

175. *Id.* § 224(2) ("In the absence of such a designation, the instrument is construed in accordance with the rules of construction that would be applied by the courts of the situs."); *see also id.* §§ 240(2) (same for wills of land), 277(2) (same for trusts of land).

176. *Id.* § 264(2) ("In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death."). A comment explains that the prevailing approach would be to construe the language in accordance with the usage in the state where the person was domiciled at the time he or she executed the will because this law would most accord with the testator's intent. *Id.* § 264 cmt. f.

applies to administration,[177] and for other issues by the law of the place that the settler "would probably have desired to be applicable."[178]

These rules are designed to effectuate party intent. They distinguish between interpretation, construction, and legal effect.[179] Courts should apply forum law to determine intent for all manner of property conveyances,[180] just as they do for contracts. Only where it is impossible to ascertain a drafter's intent from the evidence should a court apply either the law selected by the parties or, when no law is selected, the law that would be applied by the courts where the land is located (for wills of land) or the local law of the place where the decedent died domiciled (for wills of personal property).

For land, the rules direct the application not of the local construction rules of the situs but the law that would be applied by courts of the situs.[181] In deferring to situs practice rather than prescribing a rule, the Second Restatement's drafter observed that there is a split of authority over whether to apply the local law of the situs or the local law of decedent's domicile at the time he or she used the language.[182]

The Second Restatement suggests, however, that drafting language that has a fixed legal effect irrespective of intent is not governed by the choice of law rules for interpretation or construction.

177. *Id.* § 268(2)(a). Administration is governed "by the local law of the state to which the administration . . . is most substantially related." *Id.* § 272(b).

178. *Id.* § 268(2)(b).

179. *See id.* § 224 cmt. a.

180. *Id.* § 277 cmt. a ("The forum will apply its own rules in determining the admissibility of evidence, and it will use its own judgment in drawing conclusions from the evidence. This process is called interpretation . . . .") (citation omitted).

181. The law applied by the courts of the situs will either be the local rule of construction of the place where the land is or the rule of construction of the place where the person was domiciled at the time of an inter vivos conveyance, *id.* § 224 cmt. f, or at the time of the execution of a will, *id.* § 240 cmt. f.

182. *See* SECOND RESTATEMENT, *supra* note 10, § 264 cmt. f ("When the testator has not provided that his will should be construed in accordance with the rules of construction of a particular state . . . the forum will construe the will in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death. These courts, in the absence of controlling circumstances to the contrary, would usually construe a given word or phrase in accordance with the usage prevailing in the state where the testator was domiciled at the time the will was executed. This would presumably be in accord with the expectations of the testator.").

As explained in the context of the contract rules, because the rules of construction are selected for the purpose of effectuating expectations, there would be no purpose in applying such a rule if it frustrated the express expectation of the person employing the language under construction, just as it would make no sense to resort to any jurisdiction's rule of construction when intent was determinable without such a rule. *See supra* text accompanying note 147.

Instead, for the "legal effect" of such terms of art, "the applicable law is the *local* law of the situs of the land."[183] This solution is incompatible with the formal rule stated in section 277, but it preserves the result dictated by the First Restatement.[184]

VI. CONTEMPORARY PRACTICE

A. Instruments without Choice of Law Provisions

Few if any courts make the complex legal differentiations prescribed by the Second Restatement for conflicts involving interpretation and construction. Case law evidences a judicial preference for applying the law selected by substantive choice of law rules to matters of interpretation and construction.

A troubling example is *Beauchamp v. Beauchamp*,[185] a case where a Wisconsin domiciliary died testate, owning farm land in Mississippi. The will devised all real property to his children equally. It specifically provided that the land in Mississippi not be sold within 30 years of the life of any surviving children or grandchildren.[186] Finding that this intended restriction on alienation violated a local statute,[187] the Mississippi trial court applied the doctrine of equitable approximation to amend the restriction so as not to exceed the life of a child or child of a deceased child.[188]

The Mississippi Supreme Court reversed, holding that the effect of the devise was governed by the law of Wisconsin where the decedent died domiciled.[189] The decision is notable for two reasons. First, even though the state followed the Second Restatement for other matters,[190] the opinion made no reference to the Second

183. SECOND RESTATEMENT, *supra* note 10 § 277 cmt. a (emphasis added). Examples of such rules are the meaning of "To A and his or her heir" or the Rule in Shelley's Case. *See id.*

184. *See supra* text accompanying note 115. In relegating this rule to a comment, the drafters observed optimistically that the operation of such intent-frustrating rules of construction is of "no great importance today" because of the decline in many jurisdictions of the Rule in Shelley's Case and of the requirement that a conveyance of a fee absolute contain language of "heirs." SECOND RESTATEMENT, *supra* note 10 § 277 cmt. a. The drafters avoided mentioning the survival of the doctrine of worthier title and other intent-frustrating drafting rules.

A comment conceded that similar intent-frustrating rules could in theory arise in transfers of personal property but observed that they "are extremely unlikely to be encountered today." *Id.* § 264 cmt. b.

185. 574 So. 2d 18 (Miss. 1990).

186. *Id.* at 24.

187. Miss. Code Ann. § 89-1-15 (1972) (converting fee tail into fee simple but permitting devise to succession of living donees with remainder to any person or heir).

188. *Beauchamp*, 574 So. 2d at 20.

189. *Id.* at 23.

190. *See, e.g.,* Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968).

Restatement rules governing construction.[191] Second, as a dissenting opinion observed, the language of the will did not require construction because the testator's express intention to restrict alienation was never in dispute.[192]

The *Beauchamp* opinion demonstrates the tendency of courts to over-apply rules of construction to matters of interpretation without due regard to the intent of the drafter. It also demonstrates the failure of courts in selecting the applicable rule of construction to consider the state policies behind rules of construction. Having determined that the matter was one of construction governed by the law of the testator's domicile, the Mississippi court applied the Wisconsin rule that the word "devise" conveyed a fee simple absolute regardless of additional language imposing a restriction.[193] Wisconsin courts had rationalized this result by explaining that the language of a devise intended to convey a fee and additional language restricting the gift was repugnant.[194] But the Mississippi court implicitly rejected this rationalization, for it concluded that the rule enforced technical language of the conveyance that was to be given effect under Wisconsin law despite the intent of the testator.[195]

To the extent that Wisconsin's rule was not aimed at effectuating intent, it was not a rule of construction but a rule prescribing the "legal effect" of language. Such a legal effect might serve two different kinds of purposes. First, it might advance certainty and predictability in conveyancing, thus avoiding disputes over title to land. Second, it might advance the goal of freeing land from restrictions. Neither Wisconsin policy extended to real property in Mississippi. Accordingly, the application of the Wisconsin rule frustrated the (undisputed) intent of the testator without advancing any legitimate state policy.

B. Contracts With Designated Choice of Law

Courts applying the Second Restatement to private choice of law

191. The court cited state case law for the established rule that "the law of the person's domicile is to be used when construing the provisions of a testator's will, unless it is clear from the instrument itself that the testator intended that the laws of another jurisdiction should control." *Beauchamp*, 574 So. 2d at 20 (citing cases). The Second Restatement provides no guidance for the situs forum, because it prescribes application of the law that the situs would apply. SECOND RESTATEMENT, *supra* note 10, § 240.

192. According to the dissent, the trial court was correct in applying forum law to effectuate the testator's intent to the extent possible. *Beauchamp*, 574 So. 2d at 23-24 (Blass, J., dissenting) ("[I]t is basic horn book law that before a court can apply the rules of construction, it must first be determined that the will is ambiguous.").

193. *Beauchamp*, 574 So. 2d at 21.

194. *Id.* at 22

195. *Id.* at 23.

agreements fail to differentiate between interpretation and construction.[196] The Supreme Court of California's opinion in *Nedlloyd Lines v. Superior Court* provides a good example.[197] The parties, sophisticated business entities, entered a written agreement to establish a joint venture and stock purchase plan.[198] The detailed agreement[199] provided that shareholders would employ all reasonable means and cooperate in good faith among themselves to secure the corporation's performance of obligations under the contract.[200] The precise question (apparently) was whether reciprocal shareholder duties were owed to the corporation, Seawinds.[201] The agreement provided that it would be governed by Hong Kong law.[202]

The complaint stated separate claims for "breach of contract, breach of the implied covenant of good faith and fair dealing (in both contract and tort), and breach of fiduciary dut[ies]" on the theory that the joint venture gave rise to fiduciary duties that the defendants had violated.[203] The lower courts repeatedly held that the issues were governed by California law.[204] In reversing, the Supreme Court of

196. Claims that most American courts follow section 187, *see* HAY ET AL., *supra* note 3, at 1088, Lehmann, *supra* note 132, at 389, Jillian R. Camarote, Comment, *A Little More Contract Law with My Contracts Please: The Need to Apply Unconscionability Directly to Choice-of-Law Clauses*, 39 SETON HALL L. REV. 605, 606 (2009), are true only in the broad sense that most courts enforce choice of law provisions, and many courts have referred to the Second Restatement in general and section 187 in particular in doing so.

197. 834 P.2d 1148 (Cal. 1992). Scholars cite the opinion as an illustration of the Second Restatement, *e.g.*, HAY ET AL., *supra* note 3, at 113 n.7. Although one critic protests that the court deviated from the Second Restatement by failing to consider whether forum law would apply in the absence of an effective choice of law provision, Camarote, *supra* note 196, at 619-20, the opinion explicitly addressed that issue. *Nedlloyd Lines*, 834 P.2d at 1152 nn.5-6.

198. *Nedlloyd Lines*, 834 P.2d at 1149-50.

199. The contract is not fully described by the opinions in the case. Notably missing is information about whether the contract was integrated.

200. *Id.* at 1160 n.5.

201. The only discussion of the contractual language giving rise to the claims occurs in the dissenting opinion, which characterizes the issue as whether the clause establishing shareholder duties extended to Seawinds. *Id.* at 1160. Since Seawinds was the plaintiff, I assume that the issue is whether the contract established a duty of good faith by the shareholders toward Seawinds, not whether it obligated Seawinds. This would raise further questions as to whether Seawinds was the party to this contract with respect to this obligation or was a third party beneficiary. None of these contract issues are addressed by any opinion.

202. "This agreement shall be governed by and construed in accordance with Hong Kong law." *Nedlloyd Lines*, 834 P.2d at 1154 (emphasis omitted). The majority and two dissenting justices also opined that the meaning of the choice of law clause itself, if ambiguous, should be determined by Hong Kong law—though this issue was not presented by the case. *See infra* text accompanying note 218.

203. *Nedlloyd Lines,* 834 P.2d at 1150.

204. There were two sets of appeals, resulting in one published decision by the court

California took the opportunity to endorse the "modern mainstream" policy of enforcing contractual choice of law agreements. The court approved of the Second Restatement's rules: "In determining the enforceability of arm's length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement section 187, which reflects a strong policy favoring enforcement of such provisions."[205] The court announced the new rule for California that a choice of law provision must be enforced unless there is no substantial relationship between the chosen state and the parties or transaction or unless application of chosen law would be contrary to a fundamental policy of California.[206] Finally, the court held that the language of choice of law provisions should be construed broadly to cover all claims, including related tort claims.[207] Accordingly, it held that the express choice of Hong Kong law precluded both claims based on implied obligations of good faith[208] and claims based on violations of fiduciary duties.[209]

C. Judicial Deviation from Second Restatement

The court in *Nedlloyd* deviated from the Second Restatement's approach in several ways. No member of the court, including any dissenting justice, appeared to be aware of these deviations.

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of appeals. *See* Nedlloyd Lines B.V. v. Superior Court, 277 Cal. Rptr. 822, 823-24 (Ct. App. 1991) (summarizing procedural history). Although the appellate court explained that it was addressing the choice of law issue for the purpose of providing guidance and that it could affirm on other procedural grounds, *id.* at 825, the court's opinion does not entirely clarify why it concluded that California law should apply. The court cited section 187 of the Second Restatement and observed that "[t]he parties and the issues in the case have virtually nothing to do with Hong Kong." *Id.* It also may have concluded that Hong Kong law was contrary to a fundamental policy of California. In any event, it opined both that the trial court correctly applied California law, and that it did not abuse its discretion in applying California law. *Id.* at 827.

205. *Nedlloyd Lines,* 834 P.2d at 1151.

206. The majority opinion effectively applied this two-part test to sustain the choice of law provision. *Id.* at 1153. Justice Kennard's opinion stated this explicitly as the appropriate rule. After reviewing appellate decisions applying California law, Justice Kennard concluded, "When a contract specified the parties' choice of law, California courts have enforced the contractual choice-of-law clause, subject to two qualifications. First, the chosen state must bear some substantial relationship to the parties or the contract, or there must be some other reasonable basis for the parties' choice. Second, application of the chosen state's law must not violate a strong policy of California law." *Id.* at 1160 (Kennard, J., concurring and dissenting).

207. *Id.* at 1155. Three justices disagreed with the majority's conclusion, arguing that the language of the choice of law clause in the contract was ambiguous as to its application to matters other than the terms of the contract and claims arising out of the contract. *Id.* at 1156-57 (Panelli and Mosk, JJ., concurring and dissenting); *id.* at 1168-71 (Kennard, J., concurring and dissenting).

208. *Id.* at 1152-53.

209. *Id.* at 1153-55.

1. Disregard of Party Intent

The court in *Nedlloyd* failed to consider whether sufficient evidence of party intent (under California law) permitted a judicial interpretation of the agreement prior to selecting among competing rules of construction. The rules of the Second Restatement are committed to effectuating party intent. Effectuating party intent is the reason for validating chosen law; but it also limits the resort to chosen law to situations where party intent "cannot satisfactorily be ascertained."[210]

The precise question in *Nedlloyd*, the scope of duties of good faith, would normally be a matter of party intent that could be determined from the contract. On the one hand, the inclusion of detailed duties to shareholders and the omission of a corresponding duty to the corporation might support the conclusion that the parties intended no such duty to the corporation. On the other hand, the absence of any reason for excepting the corporation from the benefit of such duties, coupled with the fact that the entire relationship presupposed such duties with respect to the corporation, might support the conclusion that the parties necessarily intended such a duty to run to the corporation.

Whether the contract gave rise to such a duty would be a matter of ascertaining the intent of the parties according to familiar principles of contract interpretation. The Second Restatement makes clear that forum law should apply to this process.[211] In California, forum law implies an obligation of fair dealing as a principle of presumed intent.[212] The opinion in *Nedlloyd* emphasized that the forum rule of construction was merely one of determining intent, but it did so in order to conclude that the resulting covenant was not required by a fundamental policy that would prevent application of Hong Kong law.[213]

2. Failure to Apply Section 204

The court failed to apply—or even consider—section 204, which applies chosen law to matters of construction regardless of the connection of the transaction to the chosen state or even the chosen

210. SECOND RESTATEMENT, *supra* note 10, § 204. The Second Restatement's adherence to traditional contracts values is enacted as positive law in California. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636 (West 1985), quoted by *Nedlloyd,* 834 P.2d at 1157 (Panelli and Mosk, JJ., concurring and dissenting); *id*. at 1169 (Kennard, J., concurring and dissenting).

211. SECOND RESTATEMENT, *supra* note 10, § 204 cmt. a.

212. *See Nedlloyd Lines*, 834 P.2d at 1153.

213. *Id.*

rule of construction's violation of local policies.[214] Instead, the court assumed that all matters of interpretation and construction were governed by the choice of law rules that govern substantive validity.[215]

3. Restrictive Construction of Section 187(1)

In applying section 187 to issues of construction, the court narrowly read section 187 and found that it did not apply to the question of the scope of obligations implied by the language in the contract.[216] The court relied on one comment to restrict the validating rule to contracts that incorporated foreign law for the purpose of defining special terminology.[217] Under the court's construction,

214. SECOND RESTATEMENT, *supra* note 10, § 204, discussed *supra* notes 148-49 and accompanying text. Comments explain:

> The state of the chosen law need have no relationship to the contract. This is an area where the intentions of the parties will control if these intentions have been manifested . . . . If, for reasons stated in § 187, . . . the law chosen by the parties is not applied to govern issues of validity of the contract, this [chosen] law will nevertheless be applied to determine questions of construction. Subject to rare exceptions . . . the parties are free to determine the terms of their contract . . . . They can also provide that in cases of uncertainty the meaning of the words shall be determined by the application of the rules of construction of a given state.

Id. § 204 cmt. b.

215. The court did not distinguish interpretation and construction in its approach, and it employed the terms more or less interchangeably. *Cf. Nedlloyd Lines,* 834 P.2d at 1154 n.7 (referring to question of whether clause was ambiguous as matter "of contract interpretation that in the normal course should be determined pursuant to Hong Kong law."); *id.* at 1157 (Kennard, J., concurring and dissenting) (agreeing with the majority that contract should be "interpreted" under Hong Kong law).

216. Section 187(1) provides the formal authority for the validation of chosen law in most contexts. The drafters thought that subsection 1 would in fact apply to most issues:

> [M]ost rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions. This is generally true, for example, of rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustrations and impossibility. *As to all such matters, the forum will apply the provisions of the chosen law.*

Id. § 187 cmt. c (emphasis added).

217. The comment reasoned that applying chosen law to matters over which the parties had the power to agree as a matter of contract law could be explained by traditional contract doctrines and that courts had long honored such choices to effectuate the intent of the parties. *Id.* ("The rule of this Subsection is a rule providing for incorporation by reference and is not a rule of choice of law. The parties . . . have power to determine the terms of their contractual engagements . . . . [T]hey may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law."). The continuation of the comment, quoted *supra* note 216, makes clear, however, that this rationalization served to

chosen law would not automatically apply to most issues requiring construction, including many common "gap filling" problems it is supposed to address.

4. Use of Chosen Law to Create Ambiguity

The analysis adopted in *Nedlloyd* assumed that choice of law rules should trump contracts rules by applying the conflicts rules for matters of construction prior to any finding of the existence of ambiguity requiring interpretation. The court opined in the abstract that the issue of whether the choice of law clause was ambiguous and the scope of its application should be governed by the law selected in the choice of law provision itself.[218] It assumed, without realizing that it departed from the Second Restatement, that the existence of ambiguity in a contract—and its resolution—should be governed by choice of law rules.[219]

5. Inflating Policies Favoring Choice and Discounting Local Policies in Conflict with Chosen Law

The California court's restrictive construction of section 187(1) required consideration of the grounds that invalidate chosen law under subsection 2. In order to justify the enforcement of choice of law provisions, the court simultaneously inflated general policies favoring party autonomy and discounted forum state policies frustrated by law chosen by the parties.

Section 187(2) requires that the chosen state have a substantial relationship to the parties or that there be some other reasonable basis for the parties' choice. The court found that a party's incorporation in Hong Kong established a substantial relationship or

validate chosen law for most issues and was never understood as limited to definitions of words.

218. *Nedlloyd Lines,* 834 P.2d at 1154 n.7; *id.* at 1156 n.1 (Panelli and Mosk, JJ., concurring and dissenting). This was unnecessary to the holding because the court applied California law to the scope of the clause in the absence of evidence in the record as to the clause's construction under Hong Kong law. *Id.* at 1154 n.7. For this reason, all members of the court applied California law to the scope of the clause, but three members concluded that the clause was ambiguous and should not apply to the claims for breach of fiduciary duty.

219. The Second Restatement directs the application of "local" law in order to avoid this sort of renvoi. SECOND RESTATEMENT, *supra* note 10, § 187 cmt. h ("The reference, in the absence of a contrary indication of intention, is to the 'local law' of the chosen state and not to that state's 'law,' which means the totality of its law including its choice-of-law rules. When they choose the state which is to furnish the law governing the validity of their contract, the parties almost certainly have the 'local law,' rather than the 'law,' of that state in mind."). This result is prescribed explicitly in the rule governing construction. *Cf. id.* § 204 ("[M]eaning . . . will be construed . . . in accordance with the local law of the state chosen . . . .").

reasonable basis for the choice of that state's law.[220]

Even when supported by a substantial relationship or reasonable basis, chosen law is inapplicable under section 187 when chosen law is contrary to a fundamental policy of the state whose law would otherwise apply when that state has a materially greater interest in the determination *of the particular issue*.[221] The court concluded that California law would apply in the absence of the choice of law provision.[222] Accordingly, California law should still apply to the particular issue if California also had a materially greater interest in the determination of this particular issue and if Hong Kong law violated a fundamental policy of California.[223] Determining the strength of the state interests would require an evaluation of the respective policies of California and Hong Kong.[224]

In applying the Second Restatement, the court never determined the strength of Hong Kong's interest in applying its law. Instead, it proceeded to the conclusion that Hong Kong law would not violate California's fundamental policy.[225] It supported this conclusion with two arguments. First, it argued that California's policy behind the implied obligation was not fundamental because it was merely

220. *Nedlloyd Lines,* 834 P.2d at 1153 ("If one of the parties resides in the chosen state, the parties have a reasonable basis for their choice.") (quoting Consul Ltd. v. Solide Enters., Inc., 802 F.2d 1143, 1147 (9th Cir. 1986)). The court reasoned that Hong Kong as the state of incorporation had a "keen and intimate interest in internal corporate affairs, including the purchase and sale of its [domestic corporation's] shares, as well as corporate management and operations." *Id.* The court did not address the paradox that it was applying Hong Kong law to defeat a claim by a Hong Kong corporation for enhanced duties of good faith imposed on California and other parties by California law.

Justice Kennard observed that the purpose of requiring a substantial relationship "is to assure that the parties have not selected the chosen state's law to avoid application of the law of a particular state to their transaction by stipulating to the law of a state that has no interest in having its law applied." *Id.* at 1163 (Kennard, J., concurring and dissenting). Nevertheless, like the majority, the concurrence concluded without further discussion that there was automatically a substantial relationship or reasonable basis for applying a party's choice of its home state law. *Id.* Neither the majority nor concurring justices evaluated the chosen state's interest in applying its law to the issue in litigation. Rather both assumed that the chosen state has a generalized interest in applying its law to the contract generally. *See id.* at 1171.

221. SECOND RESTATEMENT, *supra* note 10, § 187(2)(b).

222. *Nedlloyd Lines*, 834 P.2d at 1152.

223. *Id.*

224. Ironically, both California and Hong Kong appear to have had similar interests, expressed in formally different rules that might or might not have resulted in different outcomes. California implied the obligation because that was the presumptive intent of the parties. Hong Kong would similarly imply such an obligation but evidently only when necessary to achieve the business efficacy of the agreement. *Id.* at 1160 (Kennard, J., concurring and dissenting).

225. *Id.* at 1163.

designed to effectuate party intent.[226] Second, it argued that California had a strong policy in favor of enforcing choice of law clauses.[227] This discounting of local contract policies by reference to choice of law policies may reach the right result for matters of construction, but it is incompatible with the structure of analysis set forth in the Second Restatement. Given the court's strong commitment to party autonomy, it will be difficult to show how any local state contract policy would justify invalidating a choice of law provision.

D. Revising the Restatement: The Apotheosis of Party Autonomy

As *Nedlloyd* illustrates, courts routinely enforce choice of law provisions for matters of both interpretation and construction.[228] Commentators fully approve without noting the deviation from the Second Restatement's goal of applying forum rules that effectuate party intent. Indeed, scholars often observe, in contrast to the Second Restatement, that choice of law has special force for rules of construction and interpretation.[229]

Leading treatises revise the language of the Second Restatement's rules to provide a far simpler rule, one that accords with judicial practice: the law chosen by the parties governs all matters of interpretation and construction.[230] Scholars have similarly

226. *Id.* at 1155.

227. *Id.* at 1149.

228. Empirical research confirms the trend to enforce choice of law agreements. *See* Ribstein, *supra* note 3, at 374-82 (reporting that 590 out of 697 decisions enforced choice of law provisions in contracts). Ribstein suggests that the rate of enforcement is probably greater than the raw numbers suggest because nonenforcement is restricted to a limited range of contracts and jurisdictions. *Id.* at 375.

229. Lehmann, *supra* note 132, at 425 ("Therefore, a choice of law does not have the consequence of completely submitting one to the chosen legal system. The implication . . . is that the parties may use foreign law as a source for construing and interpreting their agreement, without submitting themselves to the legal regime of the state that is the author of the rules.").

230. HAY ET AL., *supra* note 3, at 1088-89; expressed more directly in the previous edition, SCOLES ET AL., *supra* note 153, at 956; RICHMAN & REYNOLDS, *supra* note 2, at 225 ("Interpretation of contractual language, in other words, is what § 187(1) permits; and interpretation, no matter what form it takes, can always be controlled by the parties to the contract.").

For matters other than interpretation and construction, there is a tendency to revise the Second Restatement rules to provide for the enforcement of choice of law clauses except where they violate a public policy of the forum, at least where the transaction bears a substantial relationship to the forum. This revision has been criticized for omitting the Second Restatement's requirement of determining whether forum law would apply in the absence of the choice of law. *See* Camarote, *supra* note 196, at 619, 625 (criticizing Second Restatement analyses in California opinions). Arguably, however, the omitted analytic step is implicit in the court's framing of the issue as a conflict between chosen foreign law or forum law.

restated the unqualified general rule that chosen law governs contract interpretation.[231]

Professor Weintraub is in a distinct minority in insisting on the need to distinguish interpretation (governed by forum law) from construction in the Second Restatement.[232] His concern with preventing the over application of formal choice of law rules to frustrate important state policies to the disadvantage of parties in weaker bargaining positions[233] counsels caution in the rush to apply foreign rules of construction.

E. Policies Served by Applying Designated Law to Issues of Interpretation and Construction

1. Theories Supporting Private Party Choice of Law

The trend to defer to private party choice of law far surpasses the proposals of the Second Restatement.[234] Courts and scholars advance two reasons for applying the law chosen by the parties. First, they claim that enforcing law chosen by parties promotes the principle of party autonomy.[235] Second, they propose a more

231. *See, e.g.*, Ribstein, *supra* note 3, at 382 ("Thus, judicial enforcement of choice-of-law clauses is now the norm."); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 470 (2000); Christopher S. Gibson, *Report: Awards and Other Decisions*, 9 AM. REV. INT'L ARB. 181, 184 (1998); Daniel J. Dougherty, *The Impact of a Member's Insolvency or Bankruptcy on a Protection & Indemnity Club*, 59 TUL. L. REV. 1466, 1475 (1985); Camarote, *supra* note 196, at 633; J. Zachary Courson, *Survey: Yavuz v. 61 MM, Ltd.: A New Federal Standard: Applying Contracting Parties Choice of Law to the Analysis of Forum Selection Agreements*, 85 DENV. U. L. REV. 597, 613 (2008); Yavuz v. 61 MM, Ltd., 3 SETON HALL CIR. REV. 461, 500 (2007); Barry W. Rashkover, Note, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227, 243 (1985). It has been decades since an author could argue even tendentiously that cases did not tend to enforce choice of law agreements. *Cf.* Richard J. Bauerfeld, Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1669-70 (1982) ("[A] close examination of recent cases reveals that courts in those jurisdictions seldom feel bound by choice-of-law clauses.").

Today the controversies have spread to the issues of whether chosen law can determine the validity and scope of the provision choosing foreign law. *E.g.*, A.V.M. Struycken, *Co-ordination and Co-operation in Respectful Disagreement*, General Course on Private International Law, Recueil des Cours no. 311 at 65 (2004).

232. *See* WEINTRAUB, *supra* note 2, at 476, 534.

233. He has elaborated these arguments most fully in the context of applying chosen law to issues of validity. WEINTRAUB, *supra* note 2, at 518-19, 524-30.

234. Scholars are eager to challenge the remaining areas of resistance to universal application of chosen law. *Cf.* Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law,* 20 EMORY INT'L L. REV., 511, 561 (2006) (arguing that requirements by some United States jurisdictions that chosen law be connected to contract or parties are incompatible with international norms).

235. *E.g.*, *Nedlloyd Lines*, 834 P.2d at 1149 (referring to "strong policy

utilitarian argument that applying chosen law promotes certainty, predictability, economy, and other social benefits.[236] The utilitarian argument has been developed more fully by authors skeptical about the explanatory value of party autonomy. For them party choice achieves utilitarian goals of promoting certainty, providing parties with easily determined answers about the scope of their obligations and simplifying the task of courts, which must otherwise engage in difficult and unpredictable choice of law determinations.[237]

considerations favoring the enforcement of freely negotiated choice-of-law clauses."). Lehmann observes that party autonomy is also invoked to explain why forum law applies in cases where parties do not adequately plead or prove foreign law, Lehmann, *supra* note 132, at 387, though this practice long predates notions of autonomy, *cf.* FIRST RESTATEMENT, *supra* note 9, §§ 621-22 (requiring pleading and proof of foreign law and permitting presumption that foreign common law is identical to forum law).

There are two different versions of the party autonomy principle. According to the first, it makes sense to resolve disputes about the scope or meaning of an agreement by applying the rules that the parties agreed in advance should govern those issues. According to the second, it is reasonable to resolve difficult choice of law decisions by permitting parties to subordinate their private relationship to the rule of law of a designated jurisdiction. *See generally* Zhang, *supra* note 4, at 134-35. The idea that parties can subordinate their relationship to the law of a jurisdiction is closer to Savigny's idea that will and intent can signify the seat of a relationship. *See supra* notes 8, 61.

There is spirited debate about the true grounds for party autonomy. "[W]riters on conflicts . . . have failed to provide a theoretical explanation why the parties are allowed to choose the applicable law." Lehmann, *supra* note 132, at 383. *See generally* Zhang, *supra* note 235, at 511, 552-53 (discussing debate among scholars as to source and value of party autonomy as ground for enforcement of private choice of law). Ribstein argues that enforcement of party autonomy promotes the interest of the forum state in attracting potential litigants to establish contacts with the state. Ribstein, *supra* note 3, at 470 ("[P]arties' mobility in a federal system drives a competitive process that gives lawmakers incentives to enforce the clauses.").

236. *Cf.* SECOND RESTATEMENT, *supra* note 10, § 187 cmt. e. ("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 and liabilities 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. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.").

237. Professor Reimann observes that the emergence of party autonomy owes little to respect for private ordering:

> It is mainly practical: choice-of-law clauses make eminent sense. In our age, transboundary contracts and thus choice-of-law issues have proliferated, creating the potential for numberless disputes. It is usually to the advantage of all involved if the choice-of-law question is resolved by agreement ex ante. Such agreements allow the parties to make a choice that fits their own needs and to act in compliance with the chosen law. Choice-of-law clauses avoid litigation and thus save both the parties and the courts time and money. There is also little reason to believe that courts will make a better choice

2. Incompleteness of Proposed Justifications

a. Autonomy and Intent

Critics have argued that party autonomy embraces internal contradictions and is a theoretically insufficient justification for enforcing private choice of law.[238] Where the parties' meaning is explicit or undisputed and their chosen law effectuates their intent, applying chosen law promotes party autonomy. In contrast, applying their chosen law to invalidate their contract or enforce a meaning they did not intend does not promote party autonomy.

The lack of congruity between autonomy and expectation has been examined most fully in the context of contracts where parties choose a law that invalidates their contract.[239] The possibility that a designated law could frustrate the express intent of the parties demonstrates that effectuation of intent is not a function of party choice but rather of the content of chosen law. The preferred solution is to effectuate party intent and disregard the chosen law.[240]

Professor Kramer may be the only author who suggests following the principle of autonomy to its logical conclusion and invalidating the parties' intended obligations in such cases.[241] He offers two reasons in support of applying chosen law. First, he contends that enforcing chosen law allows parties to select the law that favors the greatest freedom of contract, which he thinks preferable to forum

than the parties themselves.

Reimann, *supra* note 8, at 589. Lehmann similarly argues that enforcement of chosen law is "a pragmatic solution that serves primarily the interests of the individuals involved." Lehmann, *supra* note 132, at 415.

238. GERARD KEGEL, INTERNATIONALES PRIVATRECHT 208 (1st ed. 1960) (describing enforcement of party choice as a "stopgap solution"), quoted in Lehmann, *supra* note 132, at 394 n.75.

239. SECOND RESTATEMENT, *supra* note 10, § 187 cmt. b.

240. *E.g., id.* (proposing to treat choice of law that invalidates an express provision in the contract as a mistake). Weintraub concludes that the principle of validation, conforming to party expectations and promoting state policies, should generally trump formal choice of law rules. WEINTRAUB, *supra* note 2, at 479. Weintraub also observes that a carefully drafted choice of law clause can avoid the problem of mistakenly choosing a law that invalidates the contract. *Id.* at 497.

241. Larry Kramer, *Rethinking Choice of Laws*, 90 COLUM. L. REV. 277, 280 (1990). Kramer suggests that choice of law applies only to true conflicts. But his discussion suggests that such choice is enforceable without independent inquiry into whether such a choice creates governmental interests in enforcing the rights that would have otherwise been created under the chosen law. *Id.* at 330. To make things more confusing, he adds that party choice should only be "allowed" when there is a "potential for a true conflict." *Id.* at 329. For matters of interpretation and construction, a plausible argument could be made that there is never a potential for a true conflict.

law.[242] Second, and "more importantly," he advances utilitarian arguments that enforcing chosen law promotes the shared interest of different jurisdictions in certainty and predictability,[243] though he confesses that he does not find these arguments entirely satisfactory.[244]

Scholars have focused on the extreme case where the effect of chosen law collides with intent expressed in explicit language, yet a similar collision arises in a wide range of cases whenever intended meaning ascribed to language by the parties conflicts with the meaning assigned by the law chosen in the contract.[245] Such a collision can arise when the parties' intended denotation of "wife," "dollars," or "legal rate of interest" differs from the meaning assigned by the law chosen elsewhere in the contract or agreement. Such a collision can even arise where the parties' intent was expressed silently, but where such silence is interpreted or construed differently under chosen law.

Whenever chosen law assigns a meaning unintended by the parties, enforcing choice of law neither furthers intent nor promotes party autonomy—except in the sense that parties could decide in advance to decide future disputes by flipping a coin.

b. Utility and Confusion

If the principle of party autonomy does not adequately support the application of chosen law when it frustrates the parties' intent, then the case for applying chosen law in such cases must stand or fall on the social benefits of doing so. Utilitarian arguments for enforcing choice of law are especially weak for issues involving interpretation and construction of language.[246]

242. *Id.* at 330. This argument is a restatement of the intent-based justification for autonomy and is subject to the identical challenge. Enforcing a married woman's choice of law will enlarge her freedom of contract only when the content of chosen law enlarges her freedom of contract. Where a party designates a law that invalidates her contract because she lacks capacity under chosen law, then enforcing the choice of law either does not promote freedom of contract or assigns a new meaning to freedom of contract.

243. *Id.* at 330.

244. Though dissatisfied with the rationalizations for applying chosen law, Kramer questioned the exception that disregarded chosen law when it invalidated any express provision of the contract. *Id.* at 332 ("Boilerplate, after all, is not limited to choice of law clauses . . . . If the parties' choice does inadvertently defeat their contract, they have only themselves to blame.").

245. *See, e.g.*, STORY, *supra* note 20, at 220-31.

246. *E.g.*, Ribstein, *supra* note 3, at 417, 429 (proposing that enforcement of private choice benefits jurisdictions competing for business and may encourage beneficial changes in substantive law); Lehmann, *supra* note 132, at 413-17 (proposing that enforcement of private choice promotes values of individual freedom). At least one bold writer claims that party autonomy almost never advances the main goals of conflicts.

Because the goal of interpretation and construction is to effectuate intent, application of chosen law to frustrate intent might advance some forensic or procedural goal of simplifying the work of trial courts or eliminating cases. But applying chosen law to interpretation and construction does not result in any such procedural economy. On the contrary, it results in the application of foreign rules with which a forum is unfamiliar. Applying chosen law can also create legal problems where none existed prior to the choice of designated law.[247] The point is not that applying chosen law frustrates intent, for frustrating intent may promote certainty. The point is that applying chosen law to interpretation and construction aggravates uncertainty, increasing the probability of conflicts.

More uncertainty arises when the forum and foreign law classify a rule in different ways. In *Colonial Life & Accident Insurance Company v. Hartford Fire Insurance Company*,[248] the parties agreed (during litigation) that South Carolina law should apply to the contract claims for violation of duties of good faith because Alabama followed traditional choice rules and the contract was made in South Carolina.[249] Nevertheless, determining that South Carolina law applied gave rise to a new problem because South Carolina did not recognize a contract-based claim for violation of duties of good faith.[250] Although South Carolina law recognized a similar claim based on tort theory, the trial court concluded that the contract claim was barred.[251]

The Eleventh Circuit reversed, holding that Alabama's choice of South Carolina law to govern a contract directed the application of

Bauerfeld, *supra* note 231, at 1690. Bauerfeld's strongest argument, however, is that autonomy does not promote predictability and certainty because cases do not consistently enforce choice of law clauses. *Id.* at 1669-70.

247. This is evident in the case where there is no problem as to interpretation or construction until after foreign law is injected into the case by the choice of law agreement. For example, where a woman designates her "wife" as beneficiary of an insurance policy and the policy contains a choice of law provision, the designated law could create the conflict if it construes the designation of a spouse as referring to a lawful spouse and further refuses to recognize same sex marriages. Further uncertainties can be produced by the legal limits that some jurisdictions place on the enforcement of choice of law. For example, it may be a condition for a valid choice of law provision, recognized internationally, that the agreement or instrument "must have the potential of being subject to the laws of more than one state." Lehmann, *supra* note 132, at 421. The reach of this condition, however, creates additional uncertainty. *Id.* at 423.

248. 358 F.3d 1306 (11th Cir. 2004).

249. *Id.* at 1306-07.

250. *Id.* at 1308-09.

251. "[P]utting aside terminological problems . . .[the claims] must be dismissed because they do not exist as contract claims in South Carolina or as tort claims in Alabama." *Id.* at 1308.

all (local) law that South Carolina courts would apply to the issue at hand.[252] While this may have led to the correct outcome inasmuch as it applied the same doctrine recognized in all interested jurisdictions, the court's opinion did little to explain the reason for applying South Carolina tort law. Applying South Carolina rules of construction would neither simplify the work of the courts nor achieve a better result. To the extent the conflict concerned the proper construction of the contract, applying South Carolina law to the construction of the scope of intended duties of good faith would not support a claim (since the claim is not derived from intent in South Carolina); the serendipitous fact that South Carolina provides a tort remedy in the absence of a contract would be irrelevant to the construction of intended meaning of the contract.

Applying foreign law to matters of construction expands the number of cases where party intent can be disregarded or frustrated by foreign law. The controversial application of chosen law to the scope of forum selection clauses[253] and choice of law clauses are examples. The litigation of such claims illustrates that their presence does not necessarily result in procedural economies, wholly apart from whether such litigation is decided correctly. In *TH Agriculture & Nutrition, L.L.C. v. Ace European Group Ltd.*,[254] a federal trial court dismissed claims by a Kansas-based business against a group of insurers on the ground that the case was governed by a mandatory forum selection clause. In the contract, the plaintiff had expressly consented to the jurisdiction of the Dutch courts; but the agreement did not expressly preclude litigation elsewhere.[255] Consequently, the agreement in Kansas and virtually all other U.S. jurisdictions would permit but not require that litigation take place in the Netherlands.[256] Although the forum selection clause was not ambiguous under forum law, the contract also included a choice of Dutch law.[257] Applying chosen law to interpretation and construction led to voluminous, conflicting expert testimony on the meaning of the words under Dutch law, from which the trial judge found that the forum selection clause mandated litigation in the Netherlands and

252. *Id.* at 1311 (citing Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co., 839 So. 2d 614, 616 (Ala. 2002)).

253. *E.g.*, Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006) (holding that choice of law provision in commercial contract should normally govern construction of contract's forum selection clause and remanding for determination of scope of forum selection clause under Swiss law).

254. 416 F. Supp. 2d 1054, 1074 (D. Kan. 2006).

255. *Id.* at 1062-63.

256. *Id.* at 1074-75.

257. The court noted that Dutch law would evidently govern construction even in the absence of the choice of law provision. *Id.* at 1075 n.23.

precluded litigation elsewhere.[258]

The court's decision is open to criticism. The court justified the application of Dutch law by asserting that doing so comported with the intent of the parties that the contract be governed by Dutch law.[259] Yet the result arguably frustrated party intent, because the meaning assigned by Dutch law collided with the probable actual intent that would be reasonably inferred from the language and from the rules of interpretation and construction applicable to local contracts in the absence of the choice of law.

Furthermore, the decision demonstrates that applying Dutch law to issues of interpretation and construction did not promote certainty or achieve other procedural economies. On the contrary, by applying law chosen by the parties, the trial court converted an unambiguous consent-to-jurisdiction clause into an ambiguous clause; this constructed ambiguity required extensive fact-finding, resulting ultimately in a conclusion based on procedural grounds found in foreign law that the clause was a mandatory forum selection clause.[260] This led the trial court far from the actual intentions of the parties or the policies of interested states. Resolving the dispute created by the choice of law provision required expert testimony, and the court's final decision rested on a contested point of Dutch law on which the court confessed it was not expert.[261]

Finally, it remains to be considered whether economy is achieved in a case like *TH Agriculture & Nutrition, L.L.C.*, when the application of a foreign rule of construction leads to the disposition of the case prior to trial. It is true that economy is achieved in the particular jurisdiction when a case can be dismissed, and indeed such outcome-influenced jurisprudence may motivate individual decisions. Nevertheless, this does not support the conclusion that applying chosen law to construction results in the reduction of litigation. First, when a case is dismissed under a forum selection clause, the economy may not be shared by the foreign courts where the case may be tried de novo. Second, applying chosen law to issues of interpretation or construction does not necessarily eliminate fact questions that require trial. Chosen law can even give rise to factual disputes that could have been avoided by applying forum law and searching directly for party intent without regard to foreign laws.[262]

258. *Id.* at 1077.

259. *Id.* at 1074.

260. Ultimately, the court never resolved the potential ambiguity but rested its decision on the fact that Dutch law would presume the ambiguous language as mandatory absent effective rebuttal; it found that the expert's rebuttal was not effective. *Id.* at 1079.

261. *Id.*

262. In *Wagoner v. Leach Co.*, C.A. Case No. 17580, 1999 Ohio App. LEXIS 3152, at

c. The Logic of Formalism

Enforcement of choice of law provisions has reached levels once unthinkable.[263] Today some courts apply law designated by the parties for the purpose of determining the validity of the choice of law.[264] Although the application of chosen law to the intended meaning of language lacks deep roots in American Conflict of Laws, the application of chosen law to issues of interpretation and construction mirrors the strong trend towards juridical formalism evident in other late twentieth-century legal developments, including the decline of common law challenges to arbitration clauses,[265] the enforcement of mandatory forum selection clauses,[266] and the decline

*18 (Ohio Ct. App. July 2, 1999), the Ohio court applied Wisconsin law chosen by contract to interpret or construe a contract. In doing so it found that reasonableness of termination was a fact question that required the reversal of a grant of summary judgment that had been entered applying Ohio law. *Id.* at *33-38.

263. One author in 1953 categorically rejected judicial authority for enforcement of adhesive choice of law provisions. Albert Ehrenzweig, *Adhesion Contracts in the Conflict of Laws,* 53 COLUM. L. REV. 1072, 1090 (1953) ("[W]hatever the status of the principle of party autonomy in the conflicts law of contracts in general, this principle has no place in the conflicts law of adhesion contracts."). Glover similarly contends that drafters of the Federal Arbitration Act in 1925 did not envisage the extension of mandatory arbitration to consumers, employees, and franchisees that occurred by the 1980s. J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements,* 59 VAND. L. REV. 1735, 1739-40 (2006).

264. Even scholars supportive of party autonomy have questioned the resort to chosen law to determine the validity of the choice at issue. *E.g.*, Lehmann, *supra* note 132, at 389 ("There are considerable logical arguments against allowing the parties to 'bootstrap' themselves and determine the law that applies to their own choice-of-law clause itself.").

265. *Cf.* Buckeye Check Cashing, Inc., v. Cardegna, 546 U.S. 440, 448 (2006) (holding that Federal Arbitration Act requires arbitration of challenges to validity of contract containing arbitration clause and prohibits judicial review of substantive issues other than binding character of arbitration clause); Hill v. Gateway 2000, 105 F.3d 1147, 1150-51 (7th Cir. 1997) (enforcing arbitration clause on slip of paper contained in box with computer equipment ordered by consumer over Internet).

266. *Cf.* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (enforcing forum selection clause contained on ticket delivered to passenger after payment). *Nedlloyd* cited California's prior holdings enforcing forum selection clauses in support of its decision to enforce choice of law clauses. *Nedlloyd Lines v. Superior Court*, 834 P.2d 1148, 1150 (Cal. 1992); *see generally* Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability,* 66 LA. L. REV. 123, 173-74 (2005) (exploring failure of Court in *Carnival Cruise* adequately to consider bargain and assent in formation of contract at issue); Zhang, *supra* note 4, at 166.

The Second Restatement provides that a choice of law is applicable only if the choice is valid as a matter of contract law. SECOND RESTATEMENT, *supra* note 10, § 187 cmt. a. But authors observe that the presence of a choice provision will lead to an "assumption of validity." *E.g,* William J. Woodward, Jr., *Contracting Out of the Uniform Commercial Code: Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses,* 40 LOY. L.A. L. REV. 9, 17 (2006); Camarote, *supra* note 196, at 622.

of the doctrines of unconscionability[267] and adhesion.[268]

Critics of formalism have lamented the decline of judicial protections for weaker bargaining parties, employees, franchisees, and consumers.[269] The most extreme decisions have followed principles of formalism to deny parties effective legal relief and to frustrate identifiable forum state policies. [270]

CONCLUSION

Traditional American choice of law rules for interpretation and construction seek to accommodate the goal of effectuating party intent with the goal of enforcing rules independent of party intent to ascribe legal effect to language across jurisdictional boundaries. The commitment to these competing goals motivated the distinction between interpretation and construction in the Second Restatement of Conflict of Laws.

This Article concludes that recent decisions have deviated sharply from traditional practices due to insufficient attention to the goal of effectuating party intent and over-application of Second Restatement rules governing special problems of construction to general problems of interpretation. Neither principles of party

267. Unconscionability emerged in the twentieth century as a judicial device for policing bargains that were either procedurally or substantively unfair. *Cf.* RESTATEMENT (SECOND) CONTRACTS § 208 (1981); U.C.C. § 2-302 (1952). Its decline has been observed and criticized in various contexts. *E.g.,* Glover, *supra* note 263, at 1752, 1768 (observing that majority of courts have rejected unconscionability arguments against enforcement of class action waivers). The decline of unconscionability has boosted the enforcement of choice of law agreements by reducing judicial scrutiny of contracts containing choice of law provisions. *See generally* Camarote, *supra* note 196, at 606 ("Courts spend little, if any, time on determining whether the clause in and of itself is valid outside of the conflict of laws analysis.").

268. *See generally* Zhang, *supra* note 4, at 136-51; Woodward, *supra* note 266, at 9-13; Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 (1997); Camarote, *supra* note 196, at 606.

269. *See* JUENGER, *supra* note 15, at 220 ("To reserve conflicts privileges to multinational corporations, while leaving air crash victims and victimized spouses to the vagaries of discordant laws and unsatisfactory choice-of-law rules seems wrong on principle."); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 ("Under the law written by the Court [enforcing arbitration agreements], birds of prey will sup on workers, consumers, shippers, passengers, and franchisees . . . ."); *see also* Zhang, *supra* note 4, at 143.

270. A practical denial of remedy results where a choice of forum provision is enforced requiring litigation of small claims in a distant state system that does not permit class actions. *Cf.* America Online v. Booker, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001) (enforcing forum selection clause requiring litigation of small claims in Virginia, which did not certify class actions). *See generally* Woodward, *supra* note 266, at 28; Camarote, *supra* note 196, at 620 (criticizing enforcement of adhesive choice of law provisions validating otherwise unenforceable class action waivers).

autonomy nor pragmatic considerations justify the application of foreign law to matters of interpretation when doing so yields a reading that surprises the parties and defeats their expectations. The case is strong for resisting high theory and for applying forum law to matters of interpretation and construction unless there is a good reason for applying a different foreign rule.