What Happens When Parties Fail to Prove Foreign Law?

by William L. Reynolds*

I. INTRODUCTION

The first discussion in this excellent and provoking Symposium concerns the effect of a party's failure to prove the content of foreign law. That discussion epitomizes much of what is wrong in academic thought about choice of law today.

The Symposium colloquy focused on *Walton v. Arabian American Oil Co.*[1] The issue in that case was whether an employer could be held liable under respondeat superior for an automobile accident in Saudi Arabia. Neither side offered or attempted to prove the content of Saudi law. Plaintiff instead obstinately rested his case on New York law.[2] The trial judge, however, refused to take judicial notice of Saudi law and directed a verdict for defendant.[3] The Second Circuit affirmed.[4]

That decision would be inexplicable if rendered today. It ignores the language of Federal Rule of Civil Procedure 44.1. Worse, it ignores litigation realities and common practice. There is no constitutional or practical objection to the application of New York law to the *Walton* plaintiff's case. Accordingly, the enthusiasm shown by several of the Symposium participants for the result in *Walton* can only be explained by the over-fondness for conceptualization that I believe mars contemporary academic discussion of choice of law.

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1. 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).
2. 233 F.2d at 542.
3. *Id.*
4. *Id.* at 546.

II. THE BLACK LETTER

The clear language of Rule 44.1, if it had been in force at the time that *Walton* was decided, should have led to a different result. Rule 44.1 provides: "A party who intends to raise an issue concerning the law of a foreign country shall give notice . . . ."[5] The implication for *Walton* is ineluctable. Plaintiff did not wish to raise an issue concerning foreign law; he was content to rest on forum (New York) law.[6] In that situation, the language of Rule 44.1 squarely puts the burden on the *defendant* to allege and produce foreign law. Because it failed to allege, much less prove, foreign (Saudi) law, plaintiff should have been permitted to proceed with his case under forum law.

III. A LITIGATION REALITY CHECK

That result makes perfect sense. Many legal problems have contacts with more than one jurisdiction, sometimes with three or more—a common enough occurrence around New York City or Washington, D.C., for example. If the holding of *Walton*, and the enthusiasm of the participants means anything, it is that any nontrivial contact between a foreign state and the dispute will require briefing of the applicability *vel non* of foreign law. Forum law, therefore, is not raised at the peril of dismissal. That peril is all the more extreme given the modern enthusiasm for depeçage—the notion that each issue in a case might be controlled by the law of a different state.

That result makes no sense. Researching foreign law, especially that of other nations, is expensive. Writing choice-of-law memoranda is even more expensive; the law, as well as the theory, is unbelievably abstract and indeterminate. Expensive, and otherwise irrelevant discovery might be necessary to provide support for a choice-of-law assertion.

In those circumstances, it is easy to understand why the parties often do not seek to prove foreign law. It is far more practical for the plaintiff in *Walton*, for example, to rely on New York law and not get involved in the exceedingly complicated and expensive business of proving the Saudi law of respondeat superior.[7] It is only unless and until the defendant

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5. FED. R. CIV. P. 44.1. Section 4.01 of the Uniform Interstate and International Procedure Act, 13 U.L.A. 355, 394 (1962), contains similar language.

6. 233 F.2d at 542.

7. Expert testimony on the subject might not be enough.. Ironically, Judge Frank, who wrote the opinion in *Walton*, also wrote a notorious opinion rejecting expert testimony concerning Argentine admiralty law. *See* Usatorre v. The Victoria, 172 F.2d 434 (2d Cir. 1949).

raises the issue of foreign law that the plaintiff will begin worrying about the problem of foreign law.

But the defendant also may choose not to raise the issue. Perhaps the omission is due to incompetence. It also may be that foreign law is uncertain, and argument over it would distract from an otherwise strong case. More likely, the omission is due to financial reality: the defendant probably has given its counsel a limited budget, and esoteric forays into the Saudi law of respondeat superior would not fall within that budget, unless the case involves a lot of money and it looks as if Saudi law might be controlling.[8] In many cases, therefore, neither the defendant nor the plaintiff will have any incentive to raise a possibly controlling issue of foreign law—even if they recognize its existence. And, of course, as the controlling aspect of foreign law recedes, there is even less incentive to spend time and money on it.

In short, the black letter of Rule 44.1, as well as litigation practicality, compel the conclusion that the decision in *Walton* was wrong. That still leaves the possibility, however, that either the Constitution or some inherent interest of individual states should lead to a different result. Neither does.

IV. OF CIRCLES AND INTERESTS

Supporters of *Walton* often argue that plaintiff's claim must fail because he had not established a cause of action under controlling law; that is, he failed to state a claim for which relief could be granted. That argument is easily disposed of, for it is inherently circular—it assumes that New York law, the law upon which he premised his case, cannot provide him with a remedy. That decision, however, requires a determination that New York law does not control, an issue which had not been briefed, or apparently even raised by defendant.

More plausible is the argument that the foreign state (Saudi Arabia in *Walton*) has "interests" that cannot be waived by the parties' inaction. Hence, a failure to raise the Saudi law of respondeat superior prevents

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8. One of the many curious aspects of *Walton* is the assumption by everyone—judges and scholars alike—that Saudi law controls the respondeat superior question. It certainly is plausible enough that the law of New York would control; the employment may have had a New York center, and the stay in Saudi Arabia of the employee may have been purely temporary. Unfortunately, the opinion contains no information about the employer-employee relation.

Both the court and commentators apparently believe that all issues in *Walton* were controlled by the *First Restatement* principle of *lex loci delicti*; hence, Saudi law controls the question of vicarious liability. That would not necessarily be true, of course, under modern forms of choice of law analysis.

judicial recognition of the Saudi interest in that law. A vast amount of literature examines this question of whether state law really advances state interests rather than merely providing a rule of decision. Reviewing that question is far beyond the scope of this brief Essay; I shall limit myself to the observation that it seems most improbable that any nation's concept of agency law has anything to do with the interests of that country.

The implausibility of that argument is easy to demonstrate. Consider the implications of taking seriously the state interests argument in variations on *Walton*. State interests are sacrificed constantly by litigants. Could the parties, for example, settle the case before filing, or before trial, without reference to Saudi law? If the answer is yes, what becomes of the Saudi interest? How does one distinguish *Walton* from those hypotheticals?

Even more telling is the possibility that the employment contract stipulated that it would be controlled by the law of New York. Such clauses are routinely enforced under section 187 of the *Restatement (Second) of Conflicts*.[9] Enforcement of New York law would be permissible, even if the relation had no contacts with New York, because presumably, New York law provides a developed body of precedent while Saudi law does not.

Far more important is the practical point: Litigants are very poor proxies for a state attorney general. That should be patently obvious to anyone who has ever practiced law. My job as counsel is to secure for my client a favorable resolution of a dispute. Unless I represent a frequent institutional litigant, I am indifferent as to whether that resolution advances the interests of any state. I certainly have no business as counsel in raising interests of other states that may interfere with my client's chances of success.

V. THE CONSTITUTION

Finally, it is quite possible to argue that *any* choice of forum law is constitutionally permissible; that, after all, was the traditional view. As *Sun Oil Co. v. Wortman*[10] teaches, the traditional view is entitled to some constitutional deference. Even if that is not true, however, it is difficult to see a serious constitutional objection to application of forum law as a default rule. Routine judicial approval of contracts and settlements ignoring foreign law show how little weight courts give to constitutional concerns in the area.

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9. RESTATEMENT (SECOND) OF CONFLICTS § 187 (1996).
10. 486 U.S. 717 (1988).

VI. JUDICIAL PROCESS

Finally, the *Walton* rule may be abused easily. It is inconceivable that a court would require proof of foreign law in every case when it might be controlling. Necessarily, it would be raised sua sponte only in a very small number of cases. This is especially true when the choice-of-law issue is raised by a court for the first time on appeal. That raises the questions of accountability and predictability. Whenever a court decides a case on the basis of a rule rarely invoked, but frequently available, there is a strong suspicion that the court is responding to a hidden agenda. That, of course, would be impermissible.

VII. CONCLUSION

It is bad enough that much of academic writing on choice of law is so esoteric that it borders on irrelevancy. It is far worse that judges, unfamiliar with choice of law cases largely due to their relative scarcity, will be misled by that writing into unjust decisions. Choice-of-law cases are difficult enough; they should not be made impossible by ignoring the reality of litigation. Let the parties try their own case.