

# AAIL–International Civil Litigation American Choice of Law Concepts

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# Preview—Choice of Law Issues

Summary of discussion (4 parts)

1. American choice of law concepts (Texas)  
(focus on contracts & torts—civil obligations)
2. Proof of Foreign Law
3. Enforcement of Judgments &
4. Service of process

# Choice of Law—Why do you care?

1. Cause of action/elements/defenses—does it exist?
  - a. NIED—*Boyles v. Kerr* (Tex. 1993)
    - Texas does not recognize claim for negligent infliction of emotional distress.
  - b. Statute of limitations—*Intevrep, SA Research & Tech Support v. Sena* (Dallas 2001)
    - “Because Intevrep filed suit more than one year after Sena's ‘services ceased to be rendered,’ we conclude Intevrep's cause of action is barred by limitations” applying Venezuelan law.
  - c. Statutory rules (Ley 75)
  - d. Common law—*Bridas Corp. v. Unocal Corp.* (Houston 2000)
    - Bridas a hydrocarbon developer for pipelines in Turkmenistan and Afghanistan
    - Contacted Unocal in 1995 to determine whether interested in participating
    - Ultimately, Unocal entered into its own pipeline project in Turkmenistan
    - Both had problems, Bridas filed arbitration against Turkmenistan in that country
    - Sued Unocal for conspiracy & tortious interference with contract & prospective
    - Court opinion starts: “The principle issue presented is choice of law”
    - Concluded that neither Turkmenistan nor Afghanistan recognize tort claims, so therefore MSJ by trial court in Ft. Bend, Texas affirmed by appellate court

# Choice of Law—Why do you care?

- ▶ *Blackstone v. Aramco Servcs. Co.* (Houston 1991)
  - Arabian American Oil Co. hired Blackstone, who worked in Texas and then Saudi Arabia for 15 years
  - 1979 ARAMCO investigated allegations of improper favors from contractors, Blackstone returned to Texas because ARAMCO's investigators allegedly threatened him.
  - Sued for torts (slander, negligence, false imprisonment, assault, IIED, mental anguish). Sought damages and the remedy of "ta'zir"
  - Court found that (1) Saudi Arabian law applied and those tort claims did not exist.; (2) to the extent he had a claim under Saudi workers' comp laws, those were exclusively adjudicated under the Primary Commission for Settlement of Disputes ; and (3) Texas courts lacked subject matter jurisdiction to administer "ta'zir"—the imprisonment or lashing of tortfeasor by the State.

# Choice of Law—Why do you care?

## 2. Damages (*Gutierrez/Casa Chapa*)

- a) No punitive damages
  - b) Caps—economic
  - c) Daños morales
- ▶ According to the Texas Supreme Court: *Gutierrez* – Mexico and Texas laws are different because:
- 1) limitation of damages statutes indexing a plaintiff's recovery to the prevailing wage rates set by Mexican labor law;
  - 2) “Mexican law does not recognize pain and suffering as an element of damages contrary to the laws of Texas and other jurisdictions in this country”; and
  - 3) Mexican Law does not allow for the recovery of punitive damages; and
  - 4) Mexican law authorizes recovery for “moral reparations which include injuries to a plaintiffs reputation, dignity, or honor.”

# Old Rule—*Lex loci delicti, lex loci contractus*

- Virtues
  - Simplicity
  - Predictability
  - *Stare decisis*/tradition
- Problems—unfairness, rigidity
  - Ignored interests of forum
  - Ignored interests of parties
  - Even under old system, exceptions created
  - Geographical dispute over “where” an event occurred (products liability)
- One example—*Bain v. Honeywell, Int’l* (ED Tx 2002)
  - Australian citizen moved to Alberta, Canada & took helicopter flight training lessons in Canada. Died in helicopter crash in British Columbia, Canada where courts concluded he was domiciled. Suit in Texas.
  - Allegations relating to defective installation of defective or unairworthy screw in helicopter’s fuel control unit in California. Honeywell domiciled in Texas.

# *Lex loci* abolished by case law

- *Gutierrez v. Collins* (Tex. 1979)
  - Texas—international case; based on domestic law like other states
  - Car accident in Chihuahua, Mexico between 2 El Paso residents; suit in Texas
  - Abolished *lex loci delicti* in TX
    - » Place where wrong occurred “no longer occupies such a position of esteem”
    - » Statutory language
    - » Trend among states (clear trend—now almost all)
  - Alternatives:
    - » Governmental interests
    - » Functional approach
    - » Principles of Preference
    - » Choice influencing considerations
    - » Better law
    - » Restatement—”most significant relationship”

Now the rule in majority of American jurisdictions

  - Also abolished dissimilarity doctrine
    - » Translations
    - » Public policy
  - *Duncan v. Cessna* (Tex. 1984) confirmed in contracts

# Choice of law–Restatement Section 6

- the needs of the interstate and international systems,
- the relevant policies of the forum,
- the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- the protection of justified expectations,
- the basic policies underlying the particular fields of law,
- certainty, predictability, uniformity of result, and
- ease in determination and application of the law to be applied.



# Choice of law–Restatement

## 187 Law of the State Chosen by the Parties

- ▶ Restatement—most significant relationship
  - Party Autonomy Rule
  - Public Policy
  - Contracts
- 1) The *law* of the state *chosen by the parties* to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
- 2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, *unless* either
  - a) the *chosen state has no substantial relationship to the parties* or the transaction and there is no other reasonable basis for the parties' choice, or
  - b) application of the law of the chosen state *would be contrary to a fundamental policy of a state which has a materially greater interest* than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
- (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

# 188 Law Governing in Absence of Effective Choice by the Parties

1. The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
2. *In the absence of an effective choice of law* by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
  - a) the place of contracting,
  - b) place of negotiation of the contract,
  - c) the place of performance,
  - d) the location of the subject matter of the contract, and
  - e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

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

3. If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

# Choice of law–Restatement

- ▶ Examples of specific provisions:
  - 189 Contracts for transfer of interests in land
  - 190 Contractual duties arising from transfer of interests in land
  - 191 Contracts to sell interests in chattel
  - 192 Life insurance contracts
  - 196 Contracts for the rendition of services

# Choice of law–Restatement

- 146 Personal Injuries

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

- 145 General principle applicable to tort actions

1)The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

2)Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- a) the place where the injury occurred,
- b) the place where the conduct causing the injury occurred,
- c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- d) the place where the relationship, if any, between the parties is centered.

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

- 175 Right of Action for Death

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

# Forum v. place of accident in tort law

- Several courts confronted with this issue have remarked on the unfairness of this result to the foreign defendant. One New York court stated the predicament as follows:
- To permit a New York resident vacationing in Mexico to recover hundreds or even thousands of times what a Mexican national, injured in the same accident, would receive under Mexican law would be the most serious possible violation of Mexico's interest and sovereignty in this situation.

*Feldman v. Acapulco Princess Hotel*, 520 N.Y.S. 477, 486 n. 21 (N.Y. Sup. Court, N.Y. County 1987).

- Judge Posner, in another similar case, remarked that a plaintiff cannot expect to travel: carrying his domiciliary law with him, like a turtle's house, to every country he visit[s]...[and cannot be] cocooned in Illinois law, like citizens of imperial states in the era of colonialism who were granted extraterritorial privileges.

*Spinozzi v. ITT Sheraton*, 174 F.3d 842, 844 (7<sup>th</sup> Cir. 1999);

- Federal district court noted that not protecting the justified expectations under the law where the accident occurred would:
- endorse a kind of lottery system for Wisconsin plaintiffs who are injured in Wisconsin. The "winners" of the lottery would be those injured by tortfeasors from other states that do not cap wrongful death damages. The "losers" would be those injured by fellow Wisconsinites, against whom recovery is limited. Such a system would undermine certainty, predictability, and uniformity of result.

*Boomsma*, 202 F. Supp. 2d at 879.

# Choice of law--hypotheticals

- ▶ Car accidents
  - *Clark*
  - *Anguinia*
  - *Rodriguez*
  - *Arredondo*
  - *Sanchez*
- ▶ Hotel accidents
  - *Sachs*
  - *Feldman*
  - *Gardner*

# Choice of law issues

- ▶ Is there a true conflict between laws?
  - *Graves v. BP America* (5<sup>th</sup> Cir. May 14, 2009)
    - Wrongful death claim from work related accident at BP Texas City facility, employed by JV Piping
    - Arbitration agreement
    - Defendant claimed Texas case of *Labatt Food Services* governed
    - “We, however, are not so quick to agree...we must first consider whether this was the correct choice of law.”
    - 1) is there a valid agreement to arbitrate; 2) does dispute fall w/in scope
    - Second element governed by federal common law
    - Conclusion: “This case does not require us to decide the choice of law issue because we, like other courts before us simply note that federal and state law dovetail to provide the same outcome.”

# Choice of law issues

- ▶ Depeçage and different laws in same case
- ▶ *Caton v. Leach Corp.* (5<sup>th</sup> Cir. 1990)
  - Employment separation dispute between 22 year employee and employer he sued for breach of contract/implied contract and duty of good faith & fair dealing.
  - Participated in research, design & marketing of F-16 aircraft for General Dynamic.
  - Dispute over whether California or Texas law applied because Leach worked in Texas, performed sales job in Texas, and was terminated in Texas, but had agreement which provided for applicability of California law, the principal place of business of defendant.
  - Court ruled that contract claim governed by California law, tort claims by Texas law.



# Choice of law issues

## ▶ Class actions

### ◦ *Phillips Petroleum v. Shutts* (1985)

- Royalty dispute filed in Kansas state court
- Class action owners from Kansas, Oklahoma, Texas, Wyoming, Arkansas, Louisiana, New Mexico, Illinois, and other states
- Conflict in oil & gas law between Kansas and Texas and Oklahoma
- Ruled: Kansas law did not apply to all claims, must conduct independent choice of law analysis
- Neither Due Process nor Full Faith & Credit requires Kansas to substitute its own laws for that of other states applicable to persons and events within other states

## ▶ Privilege disputes

# Choice of law issues—*forum non conveniens*

- ▶ Why maintain and exercise jurisdiction if going to dismiss under doctrine of *forum non conveniens*?
- ▶ Courts routinely applying law have greater familiarity.
- ▶ Manner in which choice of law comes up that can be very significant to parties.

# Extraterritorial application of laws

## Judicial jurisdiction v. Legislative/prescriptive jurisdiction (402–03 Restatement)

### ◦ Cases

- *EEOC v. Aramco* (1990)

- Title VII is antidiscrimination in employment law
  - Applies to companies over 15 employers
  - Prohibits discrimination based on race, color, sex, national origin, etc.
  - Defendants were Arabian American Oil Co. (ARAMCO) and subsidiary Aramco Service Co. (“ASC”) both Delaware corporations; ARAMCO’s principal place of business in Dhahran, Saudi Arabia, ASC in Houston
- Claim of race, religion & national origin harassment & termination
- Question: is conduct in Saudi Arabia by US company subject to Title VII?
  - Presumption against ET absent clear Congressional intent
  - Held—not applicable b/c absence of Congressional intent
- Civil Rights Act of 1991 overturned case (legislative v. constitutional)
- Judicial competence to determine ET reach of fed legislation?

# Extraterritorial application of laws

## Antitrust

- *Hoffman v. LaRoche* (2004)
- *Coca Cola v. Harmar* (Tex. 2005)

# Choice of law & forum selection clauses

- Forum selection generally enforceable
  - US SCT
    - *Bremen*
    - *Shute*
    - *Burger King*
  - Texas
    - *In re Int'l Profit Associates, Inc.* (Tx. Jan. 2009)
      - To avoid enforcement, must show special and unusual circumstances after contract formation that now make it “so gravely difficult and inconvenient” that person would “for all practical purposes be deprived of its day in court”
    - *AutoNation*

# Arbitration

## US SCT & Federal policy & FAA

- Favored
- Presumed to apply
- No unconscionability (clause)

## State AAs & other issues

- Different standards

## Advisability

- Cost saving?
- Preferable forum?

# US Constitutional limitations on choice of law

- ▶ Due Process

# Proof of Foreign law

- ▶ Need to establish the law



# Proof of Foreign law

- ▶ Federal v. state (Texas) procedural differences
  - Texas law presumes that the laws of other jurisdictions are the same
  - No substantive differences? *Klaxon*
    - Conflicts with federal laws (not diversity)
      - COGSA, Carmack
      - *Seguros Comerciales* cases;
        - Shipment of Reebok shoes from Jakarta, Indonesia to León Mexico, docked at Long Beach, CA transported by rail to San Antonio & trucks to Mexico, hijacked during last leg
        - Plaintiff insurer subrogee
        - Carmack/COGSA v. Mexican law (*FNC*)
      - *Project Hope* (shipment of humulin from Eli Lilly to Egypt)
    - If Congress enacts legislation in violation of international law, US courts apply the US law as controlling
    - Differing interpretations?
    - *Van Dusen & John Deere* (transferee courts apply same law/knight moves)

# Proof of Foreign law

- Procedural distinctions
  - FRE 44.1
  - TRE 203 (30 days)
  - Therefore, provide
    - Affidavit/testimony or other sworn legal opinion for law by expert/lawyer
    - Original language version of law
    - Translated into English version of law
  - TRE 1009 (45 days)

# FRCP 44.1

- A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

# TRE 203

- ▶ A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

# Texas Rules of Evidence 1009. Translation of Foreign Documents.

- ▶ (a) Translations. A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.
- ▶ (b) Objections. Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.
- ▶ (c) Effect of failure to Object or Offer Conflicting Translation. If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.

# Proof of Foreign law

- ▶ Proving it—
  - Role of experts -need them, but won't necessarily be accepted
  - Treatises—
    - Doing Business in Japan submitted in dispute over sales representation agreement. *Pennwell Corp. v. Ken Associates, Inc.* (Houston 2003).
  - Translations
  - Not confined to rules of evidence
  - Other case law
- ▶ Challenging proof—
  - Rebuttal expert
  - Conclusory/ *Daubert*
- ▶ Appeal
  - Broad review, plenary or *de novo*
  - Question of law v. fact
  - Possible to raise on appeal—although not recommended practice

# Proof of Foreign law

- ▶ Oral hearing/testimony?
- ▶ Court's own expert
- ▶ Role of treaties
- ▶ Examples of cases
  - *Volkswagen, A.G. v. Valdez* (Tex. 1995)
    - Discovery dispute in 1989 accident involving 1970 VW, seeking current corporate phone book, 1969 phone book had been produced.
    - Conflict with German Federal Data Protection Act, criminal penalties 1 yr.
    - 3 experts (German lawyer, Arkansas law professor, State Commissioner for Data Protection of Laws from Lower Saxony, Germany).
    - Here, accepted interpretation of German law, but 2 lower courts found that US interests in discovery conflicted and prevailed.
    - Texas Supreme Court, opinion mentioned the amicus curiae brief from Germany stating that production of the book would violate the *Bundesdatenschutzgesetz*, BGBl, I, 2954 (BDSG).
    - Finding no significant counter interest in the U.S, granted mandamus because trial court abused its discretion.

# Enforcement of judgments

## ▶ General

### ◦ Enforcing sister state judgments

- Full Faith & Credit
- Ch. 35

## ▶ Issues in sister state enforcement

- Gambling
- Untraditional marriage
  - Article in Texas lawyer about In Matter of Marriage of JB & HB (Texas Attorney General intervened).
  - Married in Massachusetts in 2006, where same-sex is legal.
  - Texas passed 2003 Defense of Marriage Act
- Usury
- Family law cases



# Constitution—Full Faith & Credit

- ▶ **Article IV – The States**
- ▶ **Section 1 – Each State to Honor all others**
  - Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

# Enforcement of judgments

- Constitutional considerations
  - Comity
  - Others
- *Hilton v. Guyot* (1895)
  - Enforcement of French judgment
  - Comity:
    - Neither matter of absolute obligation nor mere courtesy or good will. Recognition of territorial and other interests of another nation due respect not as matter of obligation, but deference and respect.
- Statutes/laws for enforcing foreign judgments
  - Ch. 36 in Texas (Uniform Foreign Country Money—Judgment Recognition Act)

# Civil Practice and Remedies Code Section 36.004. Recognition and Enforcement.

- ▶ Except as provided by Section 36.005, a foreign country judgment that is filed with notice given as provided by this chapter, that meets the requirements of Section 36.002, and that is not refused recognition under Section 36.0044 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The judgment is enforceable in the same manner as a judgment of a sister state that is entitled to full faith and credit

# Civil Practice and Remedies Code Section 36.005. Grounds for Nonrecognition

(a) A foreign country judgment is not conclusive if:

- (1) the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- (2) the foreign country court did not have personal jurisdiction over the defendant; or
- (3) the foreign country court did not have jurisdiction over the subject matter.

(b) A foreign country judgment need not be recognized if:

- (1) the defendant in the proceedings in the foreign country court did not receive notice of the proceedings in sufficient time to defend;
- (2) the judgment was obtained by fraud;
- (3) the cause of action on which the judgment is based is repugnant of the public policy of this state;
- (4) the judgment conflicts with another final and conclusive judgment;
- (5) the proceeding in the foreign country court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court;
- (6) in the case of jurisdiction based only on personal service, the foreign country court was a seriously inconvenient forum for the trial of the action; or
- (7) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of “foreign country judgment.”

# Ch. 36 cases

- ▶ Must file motion for non-recognition within 30 days showing grounds for non-recognition (3 mandatory and 7 discretionary). Prevents automatic recognition as if sister state judgment.
- ▶ *Hernandez v. Seventh Day Adventist Corp. Ltd.* (San Antonio 2001)
  - Hong Kong judgment for payment for medical treatment in excess of \$222K. Judgment recognized by trial court.
  - Appellate court reversed and vacated judgment because challenged under authentication and finality requirements.
- ▶ *Reading & Bates Const. Co. v. Baker Energy Resources Corp.* (Hou. 1998)
  - Canadian patent dispute turned judgment. Trial court denied recognition to enforce Canadian judgment and denied enforcement of related Louisiana judgment (secondary).
  - Appellate court reversed and found trial court could not deny Canadian judgment based on lack of reciprocity or public policy exceptions. Refused to enforce Louisiana judgment based on Full Faith & Credit because refuse to enforce the Canadian judgment “through the back door.”

# Ch. 36 cases

- ▶ *Southwest Livestock & Trucking Co. v. Ramon* (5<sup>th</sup> Cir. 1999).
  - \$400,000 Loan guaranteed by pagaré in Mexico.
  - High interest rate (48%). Default on payment obligation.
  - Suit in U.S. federal court alleging usury and RICO. Ramon sued in Mexico and obtained a judgment in Mexican court.
  - Federal district court refused to recognize under Ch. 36 because the judgment violated the public policy of Texas (usury) and granted \$5.7 million award to Southwest.
  - Fifth Circuit reversed, found that Mexican judgment was valid and enforceable even if usury and the Mexican Judgment is contrary to Texas' public policy because the cause of action (collection of a promissory note) is not repugnant to Texas public policy.

# Enforcement of judgments

- Arbitral awards
  - ▶ *Trans Chemical Ltd v. China Nat'l Machinery Import & Export Corp.* (5<sup>th</sup> Cir. 1998)
    - Pakistani corporation sought enforcement of arbitration award against Chinese corporation regarding construction of hydrogen peroxide plant in Pakistan by 2 US citizens/Pakistani immigrants. Chinese corporation sought to vacate award.
    - All contracts called for arbitration in Houston under AAA rules.
    - \$9.5 million award.
    - Award confirmed and affirmed on appeal.

# Enforcement of judgments

- ▶ Substantive grounds for non-recognition
  - No jurisdiction
  - No service of process



# American Service of Process: Historical and Significance

- Very formal yet important: “It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party *or to which he has not been made a party by service of process.*” *Taylor v. Surgell*, (2008).
- Service is the manner in which Court acquires jurisdiction over defendant:
  - Service of process is not a trivial formality, but a matter of constitutional significance. That is why it is axiomatic that even a defendant’s actual notice does not meet the constitutional requirement for service of process as a predicate for personal jurisdiction.
- Consequence of inadequate service
  - If a defendant is not served in the manner required by law, *even if he had actual notice of the suit*, the court does not have jurisdiction.
  - Defendant under no legal duty to act or respond to the allegations against it.
  - Even with actual knowledge and notice, inadequate service may not suffice if the legal requirements specify to whom service must be made.
  - Choice—challenge in first forum or in second forum on enforcement.

# Service has Constitutional Significance

- *Peralta v. Heights Medical Center* (1988)
  - Entry of default judgment against person who showed he did not receive proper service or notice reversed based on violation of due process clause under the 14<sup>th</sup> Amendment.
  - That he lacked a meritorious defense was not relevant. Rejected contention that “without a defense, the same judgment would again be entered on retrial and hence appellant had suffered no harm from the judgment entered without notice.”

# Service of Process–Method

- Personal service (Best)
  - Tag” service permissible *Burnham v. Superior Court of California* (1990)
- Mail/substituted service
- Service on Secretary of State or other designated agency
- *Kreimerman v. Casa Veerkamp, SA de CV* (5<sup>th</sup> Cir. 1994)
  - Ruled that international treaty (Inter–American Convention on Letters Rogatory) was not the exclusive means of service over foreign defendant not in U.S.
  - Convention did not preempt every other conceivable method of service of process on defendants residing in signatory states.
- *Commission of Contracts of General Executive Committee of Petroleum Workers of Mexico v. Arriba, Ltd.* (Houston 1994)
  - Service under Texas long arm statute ok
  - Union’s proof of not receiving actual notice warranted setting aside default judgment of \$180 million

# Service of Process—Key Rules

- Rule 4(f)—addresses service of process abroad in federal court
- State courts—Rule 108
  - *Commission of Contracts of General Executive Committee of Petroleum Workers of Mexico v. Arriba, Ltd.* (Houston 1994)

# Federal Rules of Civil Procedure 4(f). Serving an Individual in a Foreign Country

- ▶ Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served at a place not within any judicial district of the United States:
- ▶ (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
- ▶ (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
  - (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
  - (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
  - (C) unless prohibited by the foreign country's law, by:
    - (i) delivering a copy of the summons and of the complaint to the individual personally; or
    - (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- ▶ (3) by other means not prohibited by international agreement, as the court orders.

# Texas Rules of Civil Procedure 108a. Service of Process in Foreign Countries.

(1) Manner. Service of process may be effected upon a party in a foreign country if service of the citation and petition is made: (a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (b) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (c) in the manner provided by Rule 106; or (d) pursuant to the terms and provisions of any aor convention; or (e) by diplomatic or consular officials when authorized by the United States Department of State; or (f) by any other means directed by the court that is not prohibited by the law of the country where service is to be made. The method for service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend. A defendant served with process under this rule shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with citation within this state to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam.

# Service of Process

- Role of international treaties
- Constitutional issues

# American Choice of Law Issues

- ▶ Concluding thoughts/issues



**Questions?**