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THE CONFLICT OF LAWS OF CONTRACTS
GENERAL PRINCIPLES

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by

OLE LANDO

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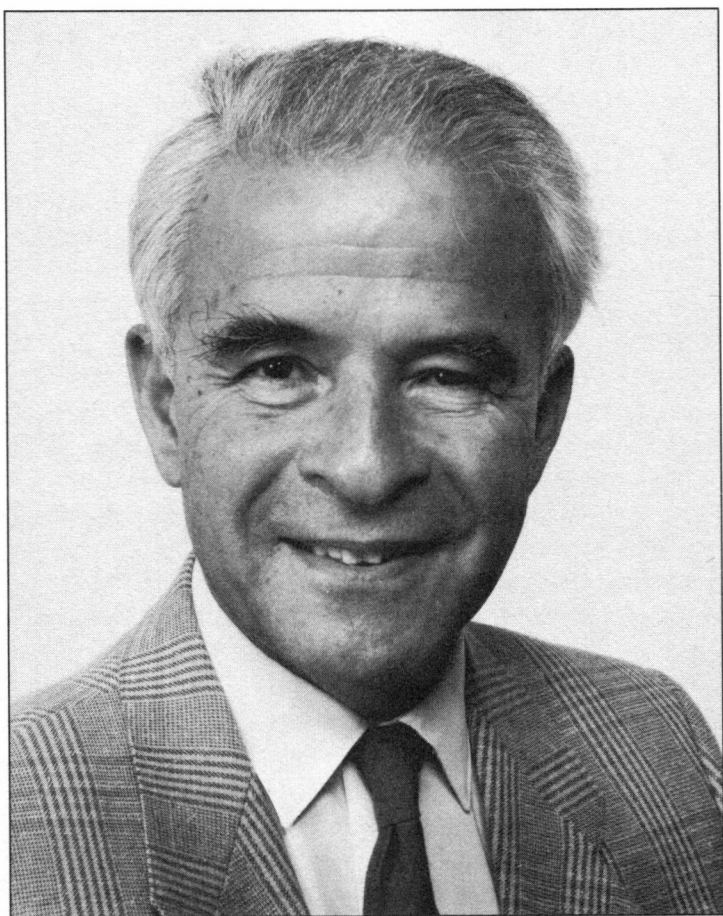
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**General Course
on Private International Law**

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O. LANDO

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BIOGRAPHICAL NOTE

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PRINCIPAL PUBLICATIONS

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Kort indføring i komparativ ret (Short Introduction to Comparative Law), 1986.

INTRODUCTION¹

Of all the various forms which private relations between individuals from different States or nations assume the contract is the most frequent and, from an economic point of view, the most important. Any international contract is governed by law, and the subject to be treated in these lectures is which national law governs it. This subject is called the conflict of laws, and the lectures deal with the conflict of laws of contracts. They treat the conflict of law rules of contracts in general. They attempt to give an account of the more representative legal systems, notably those of England, the United States, France, the Benelux countries, West Germany, Switzerland, the Scandinavian countries, and finally the Soviet Union and the Socialist countries¹. They also treat of the important international conventions on the subject such as the EC Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (hereinafter referred to as the Rome Convention 1980) and the Hague Conventions on the Law Applicable to International Sales of Goods of 15 June 1955 (the 1955 Hague Convention) and of 31 October 1985 (the 1985 Hague Convention).

The presentation is divided into two chapters.

In an introductory chapter the problems and method of presentation are explained, and a brief historical survey of the history of the conflict of laws of contracts is given. In the second chapter which is concerned with the proper law of the contract the general principles will be discussed.

CHAPTER I

PROBLEMS, METHOD, HISTORY²1. *The Problems*(a) *The problem of unity*

Is the contract to be governed by a unitary law or should *dépeçage*³ be admitted which allows different aspects of a contract to be governed by different systems of law, so that, for instance, questions of formation, validity and interpretation are governed by one legal system and questions of performance by another (Chapter II, 1)? Does one law also govern the obligations of both parties to a bilateral contract or should the courts practise a *splitting*⁴ of the contracts as a result of which the obligations of each party would be governed by a separate system of laws, such as the law of the place of his performance or the law of his domicile? Although the majority of the countries lend their support to the solution that a single system of laws governs the contract, some legal systems seem to prefer a *dépeçage* and a few a splitting of the contract.

A problem which is linked to the problem of unity is raised by mandatory rules governing the essential validity of the contract (*lois de police*). Are these rules to be found in the law which in other respects governs the contract – the proper law – or in some other law? This problem has assumed a growing importance during the last decades (Chapter II, 4).

(b) *Party autonomy*

Should the courts recognize the freedom of the parties, by a party reference or a choice of law clause, to choose the law which is to apply to a contract? (Chapter II, 2.)

The parties' right to choose the law which governs an international contract is so widely accepted by the countries of the world that it belongs to the common core of the legal systems. Differences only exist concerning the limits of the freedom of the parties. Some countries seem to allow the parties an almost unrestricted freedom

to choose the applicable law. Others limit their freedom either by demanding a local contact with the legal system chosen or by excluding some questions which are covered by mandatory rules or some contracts from being affected by the parties' choice of law.

(c) *The law applicable absent a free choice of law*

What method and what rules should be adopted in cases where there is no effective choice of law (Chapter II, 3)? Should the courts apply one or more fixed conflict rules for determining the applicable law? Or should they adopt a flexible method?

Should the courts of the countries which have adopted a flexible method rely on the intentions or interests of the parties in selecting the proper law of the contract or should they attach more weight to other social considerations such as the governmental interests behind the rules of substantive law involved?

In this field the laws of the world offer an almost continuous spectrum from a single inflexible rule to the most flexible method. Some important countries let the law of the contract depend upon one connecting factor only. In a few countries a catalogue of fixed rules is provided. The use of flexible methods prevails, however. Some courts rely on a presumed intention of the parties. The proper law of the contract is the law by which the parties may fairly be presumed to have intended the contract to be governed. Other countries have adopted the method of seeking the centre of gravity according to which the proper law is determined by looking for the legal system with which the contract has its closest connection. Relying either on the presumed intention or on the criterion of the centre of gravity, the legislatures or the courts of some countries have formulated rules of presumption for the various types of contracts. These presumptions guide the courts when called upon to determine the proper law of the contract and help to avoid solutions on a case to case approach. In some countries, however, reliance on the presumed intention or on the criterion of the centre of gravity has led only to a concatenation of individual decisions, and very few rules have been established. Finally, some authors have suggested methods according to which the issue to be decided should be considered in order to apply the law of the country which has shown the greatest interest in the issue or the law that would procure the best practical result. These authors have more or less

abandoned the classic method of the conflict of laws as well as the notion that the proper law of the contract is a unitary law. For them a proper law exists only for a particular issue. Their theories have had support in some courts of the United States.

2. The Method

(a) No global theory

In the nineteenth century and at the beginning of the twentieth, most continental authors try to solve the problems concerning the conflict of laws with the help of a few axioms or global theories. In Roman law and in the "nature of things" von Savigny found support for his theory on the seat of the legal relationship and for the application of the law of the place of performance to the contractual obligation⁵. Even in modern times the influential French author Batiffol maintains that the parties, by their agreement, localize the contract, thus enabling the courts to establish the applicable law, but do not expressly select this law. In his opinion this theory is based on the practice of the courts in several countries⁶.

I have found no basis in the decided cases or elsewhere for a simple and global theory which can explain the entire field of the conflict of laws of contracts. Nor have I seen it as the purpose to defend or establish such a theory. The methods and rules applied and those which are put forward by the present writer are based on various, sometimes conflicting, social considerations, party interests as well as other governmental interests. Among these considerations, however, there are some to which, in the following pages, greater importance will be attributed than has been done by the majority of the courts. The most important of these considerations are the need for predictability and the *desideratum* for uniformity.

(b) The universalist and the particularistic attitude

In the conflict of laws of contracts two well-known ideologies are noticeable. One is the universalist. The conflict rules should be framed so as to secure uniform results. The same conflict rule should be applied to the same matter regardless of which country or State assumes jurisdiction. In order to achieve this uniformity writers —

for this school of thought is mainly presented by writers⁷ – have attempted to formulate multilateral rules of the conflict of laws based on connecting factors which give foreign law and the *lex fori* an equal standing to be applied. In other words, uniformity is to be reached through equality.

The opposite approach is the particularistic. Conflict rules should be framed in close harmony with the substantive law rules and the general policies of the *forum*. The conflict rules of the *forum* are part of the law of a country and should serve the policies of that country. Therefore, the social policies of the *forum* country should determine the application in space of its laws and determine when to apply foreign law. Uniformity and equality are only secondary objectives for the conflict of laws. This point of view is taken by some authors⁸ and legislatures and courts.

(c) *Preference given to the universalist attitude*

In this, as in other fields of the law, the dilemma must be faced between the need for certainty ensured by fixed rules and the desire for justice in the individual case ensured by flexible methods and rules. Fixed rules may lead to unfortunate results. Attempts to do justice in the individual case may render it impossible to predict results. Rules on the conflict of laws, it is submitted, should serve both needs, but preference should be given to the requirement of certainty. A party needs rules to guide it both when making a contract, when performing it, and when a dispute with the other party threatens.

In international trade predictability can be achieved only if the courts of all countries strive to establish rules on the conflict of laws which ensure uniform results. The rules must be uniform and multilateral so as to give foreign substantive law the same opportunity to apply as the substantive law of the *forum*.

3. *History*

(a) *The civil law until 1800*

(i) *Roman law*. – The legal systems in the ancient world did not develop rules on the conflict of laws to any great extent⁹. Two provisions in Justinian's *Digest* have often been invoked in cases

concerning the conflict of laws on contracts and other private transactions. These are D.21.2.6 "si fundus"¹⁰ and D.44.21.7 "contraxisse"¹¹. "Si fundus" laid down that a seller of land must give security for this title according to the customs prevailing at the place of contracting. "Contraxisse" pronounced that everybody was assumed to have contracted at the place where he had promised to perform the contract. The value of these provisions as sources of law is slight, if judged by modern standards. A general rule to the effect that the law of the place of contracting should be applied can hardly be deduced from the very special provision of "si fundus"¹², and it was later shown that "contraxisse" only gave the courts of the place of performance the jurisdiction which the courts of the place of contracting possessed already¹³.

(ii) *Bartolus*. — Bartolus a Sassoferrato, the post-glossator (1314-1357), asserted, however, that the law of the place of contracting governs all questions concerning the form and substance of the contract. He cited "si fundus" and claimed that this rule must also apply when the law of the place of contracting and the law of the place of performance are not identical. The effects of the contract, however, were to be governed by the law of the place of performance if such place had been agreed upon by the parties, expressly or by implication. If not, the law of the forum would govern the effects¹⁴. According to Bartolus the "natural consequences" were included in the substance of the contract, as for instance the demands for due performance¹⁵. He held that the effects comprised the "irregular consequences", e.g., the consequences of the seller's negligence or delay in performance¹⁶. This *dépeçage* of the various aspects of contracts to be submitted to two legal systems is also to be found among later writers¹⁷. Most authors, however, did not advocate any *dépeçage*, and it seems as if the application of the *lex loci contractus* was the prevailing rule in continental Europe during the following centuries¹⁸.

Contracts, on the whole, did not give rise to many conflict cases. Most of the law of contracts was *jus commune* and was left untouched by special statutes. The law of matrimonial property was to a greater extent governed by diverging statutes, and the solution of problems relating thereto engendered some of the rules which later assumed dominant importance in the conflict of laws in matters of contract¹⁹.

(iii) *Dumoulin*. — The prevailing rule that the law of the place of

contracting applies was first criticized by the French author Charles Dumoulin (1500-1566)²⁰.

In those branches of the law, according to Dumoulin, where the intention of the parties is the decisive factor the circumstances indicating such an intention should determine which law shall prevail. The place of contracting, the present or former domicile of the parties, and other circumstances are all to be considered. "Si fundus" as well as other sources cannot be applied to all cases. "The actual wording of the text must be capable of being construed without subtlety and must have regard to common cases; it must not, in a hair-splitting spirit, seek to embrace rare cases"²¹. If, for instance, a man on a journey in Italy sells one of his houses in Tübingen, there is no necessity for him, according to the Italian rules, to provide two sureties to guarantee against eviction and he is not liable in case of eviction to pay double the value of the house. He must give security only in accordance with the rules prevailing in Tübingen or the *jus commune*. In this case the place of contracting is incidental. But if the same man, living in Tübingen, while there sells his house in Genoa to a neighbour in Tübingen he has to give security in accordance with the rules of Tübingen. Here "si fundus" applies. It may be applied in those frequent cases where the contract is made at the domicile of both parties.

Dumoulin was one of the first authors to point out the importance of the domicile as a connecting element and to find the applicable law by an evaluation of the connecting factors in the individual case.

The rules just described were "all", in the words of Dumoulin, "in accordance with tacit and probable intentions of the parties"²². Because of this passage Dumoulin was called by later writers the father of party autonomy²³. The idea of party autonomy in the modern sense of the words, however, can hardly have crossed his mind. According to recent authors, it is not probable that Dumoulin intended the will of the parties to decide which law to apply in the matter of contract when mandatory provisions of substantive law were involved. The intention of the parties was mentioned by Dumoulin in a context where he discussed those parts of substantive law where the intention and will of the parties prevailed²⁴, and all the examples which he used were taken from parts of the law where the rules were directory. In the following part of his disquisition, dealing with "matters not depending on the will of the parties,

but on the force of the law”²⁵, the parties’ intention was not mentioned as an explanation of the conflict rules which he established.

(b) *Dutch influence on the common law*

Until the latter part of the eighteenth century the application of foreign law was almost unknown to English courts. In the first English cases in which the application of foreign law was discussed the courts proved to be influenced by the seventeenth-century Dutch writers, Huber and Voet, and this influence continued to assert itself in England and spread to the United States. Huber’s short treatise *De conflictu legum*, in particular, was frequently consulted²⁶. In matters of contract the intention of the parties was, both according to Huber and other writers, an important reason for the application of the *lex loci contractus* and for the exceptions in favour of the *lex loci solutionis* which Huber also established²⁷. But Huber and his fellow countryman also explained their rules by the principle of sovereignty. Foreign law does not bind the authorities in other States and is applied *ex comitate* only.

If the sovereign’s laws would not uphold the contract, it was invalid at the place of contracting and everywhere else. The parties owed allegiance to the sovereign of the territory where they acted. A territoriality concept prevailed in the sense that acts done and things and persons situated at a certain place were governed by the laws of that place.

(c) *The nineteenth century*

The first codifications. — The *lex loci contractus* retained its importance even after Dumoulin. This, it is believed, was mostly due to the manner in which contracts at that time were concluded and performed. The sale of goods, for example, was generally concluded *inter praesentes* and was performed at the time and place where it had been made. When the first codifications of private international law took place in the eighteenth century and the beginning of the nineteenth century, the rule that the law of the place of contracting applies was reaffirmed²⁸; the early Continental law reports also show that the *lex loci contractus* was preferred throughout the first half of the nineteenth century. Many authors and many courts based their reliance on the law of the place of contracting, and —

when used in a few cases — on the law of the place of performance, upon the presumed intention of the parties²⁹.

In the nineteenth century the place of contracting lost its paramount importance both in large parts of the European Continent and in England. This was partly due to a change in the habits and the techniques of international trade.

Until the beginning of that century merchants had owned the ships carrying their goods and they themselves or their agents had bought and sold their cargoes in the ports. When in about 1840 international trade increased rapidly, shipping had already become a separate trade; the merchants and their agents accompanied the ships less often and contracts of sale were not concluded as frequently as before at the place where the goods were loaded and unloaded. From 1850 onwards postal and telegraph services were developed for the convenience of international trade, and the activities of banks also increased through the use of new forms of credit. All this broke up the unity of place and time in the making and performance of contracts. Now both these acts were done by each party at different places and at different times.

The intention of the parties took over the role which the place of contracting had occupied. From 1865 onwards party autonomy was established as the guiding principle by the courts of England, Germany and France. The intention was, however, nearly always a presumed intention and the new rule, though common in Europe, broke the uniformity created by the rule which relied on the place of contracting. The detailed rules, if any, which were established as expressions of the presumed intention differed from country to country, and in a considerable number of cases the intention was found to fasten on the *lex fori*. This preference for the *lex fori* or homeward trend became very noticeable in the French, German and English conflict of laws of contracts.

CHAPTER II

THE PROPER LAW OF THE CONTRACT

1. *The Problem of Unity*

The first of the three main problems mentioned in the introduction was: Should the contract be governed by a unitary law, or should various aspects of the contract be subject to different laws?

(a) *The “dépeçage”*

(i) *American case law and the Restatement (1934)*. — A few medieval authors were prepared to apply the law of the place of performance to questions concerning breach of contract; other contractual problems were to be decided by the law of the place of contracting. In most countries of Europe this theory was not adopted, but in the United States a *dictum* by Justice Hunt in *Scudder v. Union National Bank of Chicago*³⁰ became of paramount importance:

“Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance . . . A careful examination of the well-considered decisions of our country and of England will sustain this position.”

It has been difficult for the present writer to find more than a very few of these “well-considered decisions” in England³¹ and the United States. The holding of the *Scudder* case was that the validity of an oral promise to accept a draft should be decided by the law of the place where this oral contract was made. Sixteen years later this holding was clearly disregarded by the Supreme Court in *Hall v. Cordell*³².

Nevertheless, the *dictum* was used as the guiding principle for a great many American cases after that time, and under the influence of Joseph Beale and the Restatement 1934 the rule in the *Scudder*

case became the prevailing law in the United States. By 1986 it remained so in several American states³³.

The rule reflects the principle of territoriality which had been introduced into Anglo-American law by the Dutch writers of the seventeenth century. Every act should be determined according to the laws of the place where it had occurred. Beale, who was the reporter of the First Restatement of the Conflict of Laws from 1934, and his co-authors wanted the validity and the effects of a promise to be governed by the law of the place of contracting³⁴ and the duty of performance and the right to damages for breach of the contract to be determined by the law of the place of performance³⁵. In Beale's writings and in the Restatement 1934 which was a creation of his mind, an enumeration was attempted of those problems which either law should decide, but it was admitted that the distinction between the creation of an obligation and the performance thereof was difficult to draw and could not be based upon logic. It was a question "of degree" which "must be governed by the exercise of judgment"³⁶.

(ii) *Swiss case law till 1952*. — A *dépeçage* has also been practised in Swiss case law. During the nineteenth century the courts adopted the principle of party autonomy, but in a case tried in 1906³⁷ the Swiss Federal Tribunal maintained that the law of the place of contracting was to determine all problems concerning the formation of the contract. It seemed that the principle of territoriality had influenced this decision. From that time on, for more than 40 years, Swiss courts applied the law of the place of contracting to questions concerning the formation of the contract and the law presumed to have been chosen by the parties to questions concerning its effects.

(iii) *Criticism of American and Swiss case law*. — The experience of American and Swiss courts, however, seems to encourage the application of a unitary law to most legal questions concerning a contract.

Dépeçage leads to difficulties in separating those questions which belong to one category of operative facts or one legal category from those belonging to another. In the *Brantford City* case³⁸ the federal court for the Southern District of New York stated that the distinctions made by Justice Hunt in the *Scudder* case (*supra* (i)) were not applicable to the problem of the validity of a stipulation in a bill

of lading exempting the carrier from liability for the negligence of his crew.

“These distinctions are inconclusive here; because while, on the one hand, the question concerns the ‘validity’ of the stipulation, and so would fall under the first branch of the rule, the negligence, on the other hand, and the stipulation for exemption from liability for negligence in the performance of the contract, are ‘matters connected with its performance’, which would fall under the second branch³⁹.”

In *Swift & Co., Inc. v. Bankers' Trust Co.*⁴⁰ Judge Lehman of the New York Court of Appeals stated that the corresponding formulations of the Restatement had not removed uncertainty and doubt in their application. Interpretation and performance of a contract are so intertwined, that the courts often determine pragmatically the question whether the law of the place of contracting or the law of the place of performance regulates matters which though “bearing upon the interpretation” are at the same time “connected with performance”.

The attacks on the *dépeçage* of contracts proposed by the Restatement were perhaps even more frequent and more violent in American legal literature⁴¹.

“A rule which makes it unnecessary to attempt such a distinction and which submits to a single law all substantial matters relating to the contract and the rights created thereby is obviously easier of application and should lead to greater certainty and predictability⁴².”

(iv) *The Chevalley case in Switzerland, 1952*. — The uncertainties inherent in the distinction were pointed out by the Swiss Federal Tribunal in a decision of 1952 whereby *dépeçage*, or *coupure générale* as it is also called, was openly disavowed and a unitary choice of law rule was reintroduced into Swiss case law. In the opinion of the court *dépeçage* was to be avoided. The distinction between the formation of a contract which is governed by one law, and its effects which may be governed by another, is often difficult to draw and may remain uncertain until the court of last instance has rendered its decision, a situation which may endanger the certainty of law. The Swiss court also pointed out that a contract is a unit from an economic and from a legal point of view and that questions bearing upon its execution, interpretation and discharge should all be go-

verned by one law. Certain rules respecting one of these aspects correspond to other rules dealing with other aspects. A *dépeçage* corrupts this unit⁴³.

(v) *New trends towards dépeçage in the United States.* — Recent developments in American legal theory have induced some American courts to turn to a new kind of *dépeçage*. Influential authors have advocated several choice-influencing considerations and among them the “governmental interest” or the “purposes and policies” underlying the substantive law rules and the “better rule of law” or the “current trend in the law”⁴⁴. In doing this they view and weigh the contact of an issue with a state in relation to the interests of that state in having the issue governed by its laws. These authors maintain that a contract may be governed by several laws. If for instance the court finds that because of the purposes and policies of one of the states involved one issue finds its most appropriate answer in accordance with the law of that state while for the same reasons another issue is to be governed by the law of another state, a cleavage of the contract may occur. The advocates of these theories do not want to see the formation and validity governed by one law and performance by another, but they are prepared to concede that each individual issue which touches these and other legal aspects is to be treated separately.

(vi) *Restatement 2d (1971).* — These theories have influenced the Restatement 2d (1971). Paragraph 188 provides that the rights and duties with respect to an issue in contract are determined by the law of the most significant relationship. Thus the Restatement stresses the relationship of the issue and not of the contract as such with the local law of a certain country or State. This is in accordance with the general philosophy behind the new Restatement. Instead of formulating a closed set of rules as did the authors of the earlier Restatement, the American Law Institute has preferred to offer standards of greater flexibility. In the comment to paragraph 188 it is said that each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states⁴⁵. The theory of the interest analysis advocated by Brainerd Currie underlies it. If the *forum* State has an interest that a statute or rule of law is applied to the issue then this law or rule should be applied by the *forum* State regardless of the legal system which might govern

other aspects of the contract. If the *forum* State is disinterested, then the interests of other States in the issue will be considered. The Restatement Second which was directly influenced by Robert Leflar, pays more heed to the interests of a foreign State or country than did Currie⁴⁶, but both lay greater emphasis on the specific rule of law and its application in space than on the entire contractual relationship as a social phenomenon and its connection with a certain State or country. The same approach is advocated by several other authors such as Cavers, von Mehren, Trautman and Weintraub (see *infra*, 3 (b) (iii) (2)).

The Restatement 2d (1971), however, does not abandon the notion of the unity of contract completely. It also emphasizes the protection of the justified expectations of the parties as important choice-influencing considerations⁴⁷. These factors, however, vary in importance. They are of considerable weight with respect to issues involving the validity of a contract, but play a less significant role with respect to issues touching the nature and the obligations of the parties⁴⁸. Parties will expect the contract to be valid, but if they have not spelled out the obligations in the contract, they will not be disappointed by the application of the directory rules (for instance on the time and mode of performance) of one State rather than the rules of another State⁴⁹. Hence, in fashioning the choice of law rules concerning the rights and duties of the parties to a contract which is valid, greater emphasis must be laid upon considerations other than that of the justified expectations of the parties. The relevant policies of the country of the *forum* and of other interested States and the ease in the determination and the application of the law to be applied may for instance have greater weight⁵⁰.

However, the rules of the Restatement 2d (1971) dealing with the particular contracts and with the particular issues of the contract do not provide for any major difference between validity and obligation. Most sections of Title B concerning the particular contracts start out as classical conflict rules in which operative facts are governed by the law referred to by a connecting factor, and then it is added:

“unless, with respect to the particular issue, some other State has a more significant relationship under the principles stated in paragraph 6 to the transaction and the parties, in which event the local law of the other State will be applied”.

Apart from this reference to paragraph 6 specific government interests or other considerations are very rarely mentioned in Title B and in Title C concerning the particular issues. The presumptions stated in the rules may be stronger when a question of obligations comes up, but not much is said about the distinction in the sections of Titles B and C.

(vii) *The Rome Convention. Criticism.* — The method adopted by the Restatement 2d (1971) is intended to establish some guidelines indicating the many choice-influencing considerations before the courts. The guidelines represent the standards, the open-ended norms. In order to help the practitioners a series of presumptions are provided. They form part of the choice of law rules which the courts will usually follow in given situations. They are mostly empirical appraisals of what the courts have done in the past rather than directives for the future decisions of the courts. They should not arrest the dynamic element in judicial adjudication.

The present writer agrees that conflict rules respecting contracts should be so framed that a dynamic development by the courts is not inhibited (see *infra*, 3 (c) (ii)). However, apart from the rules on the choice of law by the parties, the chapter of the Restatement 2d (1971) on contracts will not, it is submitted, give businessmen and their counsel the necessary amount of certainty. The sections and the comments do not indicate sufficiently whether the courts will attribute primary importance to certainty and predictability. It is not clear, for instance, whether the connecting factors, which in the sections on particular contracts (paragraphs 189-197) are stated to play an important role in the determination of the country the law of which is to apply, are to be disregarded in favour of choice-influencing considerations such as the interests of a particular State. Predictability cannot always be the overriding consideration, but few others can rival it. When it is accorded a secondary importance its function ceases altogether. It seems as if in the chapter on contracts the authors of the Restatement 2d (1971) have yielded too much to the other choice-influencing considerations (see *infra*, 3 (c) (ii) (2)).

The principle of unity in the conflict of laws relating to contracts has been adopted by the courts in England and the other Commonwealth countries, in France, Switzerland and the Benelux countries, and by the courts in Scandinavia⁵¹. It has been embodied in the

legislation of the 1960s in Czechoslovakia, Poland and Portugal, in the laws of East Germany of 1975 and of Hungary of 1979, and in the Yugoslav, Turkish and Peruvian Acts of the 1980s⁵². The case law of other Socialist countries presupposes the recognition of one proper law of the contract, and the writers in these countries take the same attitude⁵³. The present writer, too, supports the acceptance of a unitary law as a guiding principle.

Article 3 (1) of the Rome Convention⁵⁴ provides that the parties by their choice can select the law applicable to the whole or a part only of the contract⁵⁵. Article 4 (1) which treats the law applicable in the absence of a choice of law by the parties lays down that the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may, by way of exception, be governed by the law of that other country. According to the *Official Report* some delegates were opposed to any mention in the convention of *dépeçage*. Most of the delegates, however, did not wish to exclude – and thereby prohibit – an agreement by the parties to have a part of the contract governed by a separate law provided this does not lead to the application of conflicting substantive rules⁵⁶. None of the delegates favoured *dépeçage* or splitting in cases where the parties had not made a choice of law. However, a majority would provide that in exceptional cases a severable part of the contract might be governed by another law than the law of the contract if that part has a closer connection to the other law. This may apply to complex agreements such as joint ventures⁵⁷.

No objection can be raised against the application of more than one law to a complex agreement containing elements which may each exist as separate contracts. A contract which is at the same time a sale of goods and a distributorship agreement may be governed by the law of the seller as regards the sales aspects and by the law of the buyer/distributor as far as the distributorship aspects are concerned.

This is not a genuine *dépeçage*.

The true *dépeçage* operates when separate issues in contract are governed by separate laws. It is generally agreed that some issues such as capacity, formalities and the mode of performance are governed by separate laws. Some rules, especially of a public law character, raise important problems in so far as they govern the essential

validity of the contract, see *infra* under 4. The scope of the proper law is not all embracing, but should, it is submitted, be restricted by some well-defined exceptions only⁵⁸.

(b) *Splitting of the contract*

(i) *German and earlier Swiss and Scandinavian law.* — The technique of splitting the contract seems to have originated in Germany where von Savigny in his famous “System des heutigen römischen Rechts” argued for the application of the law of the place of performance. Von Savigny was one of the first true universalists of modern times. In his view every legal relationship was to be determined by the same law, no matter in which country the action was brought. He alleged that the law of nations demanded this solution which constituted a true advantage for everybody. On this basis he established a “seat” for each type of legal relationship. The seat of the contractual obligation was its place of performance. Von Savigny acknowledged that in bilateral contracts in which each party is to perform his obligation in a different country, the application of the law of the place of performance may lead to the application of two different laws and thus to a splitting of the contract, but he claimed that this was in accordance with Roman law where a contract of sale was not infrequently concluded by means of two separate stipulations. The obligation and not the contract was the legal relationship on which to base the conflict rule, and so it was natural to localize every obligation in a country of its own⁵⁹.

The idea of splitting was also favoured by von Bar⁶⁰ and by later German authors who argued in favour of the application of each party's national law. It was contended that it was in accordance with the legitimate expectations of each party that his obligations should be governed by his own law. From about 1860⁶¹ onwards the German courts applied the law of the place of performance, and thus gradually developed the technique of splitting bilateral contracts. In the first decades of this century under the influence of German authors, especially von Bar, a few Scandinavian and Swiss writers advocated the application of the law of the domicile of the debtor⁶². In one Danish case decided in 1914⁶³, this led to the application of two laws. Except for this decision Scandinavian courts are not known to have been presented with a case in which they were even asked to divide the bilateral contract so as to render

two laws applicable. They did not do so even in the period at the beginning of this century when they tended to rely on the general presumption that the law of the debtor's residence applies. The Swiss courts under the influence of von Savigny determined questions relating to the performance of a contract by reference to the law of the place of performance. In theory this could have led to the application of two laws when the places of performance of the parties were situated in two countries. This attitude was maintained until 1949⁶⁴.

The main reason why the German courts applied the law of the debtor's place of performance was that it produced a fortunate coincidence. When as in most cases the obligation of only one of the parties was at issue, the law applicable turned out to be the law of the *forum*. According to German substantive law the debtor generally has to perform at the place of his residence⁶⁵, and according to the German law of civil procedure he is generally to be sued at the same place⁶⁶. The Scandinavian laws of civil procedure all follow the same rule as the German, and the frequent coincidence of the law of the domicile and the law of the *forum* was noticed by the Swedish jurist Almén, who therefore advocated the application of the law of the domicile⁶⁷.

Unlike von Savigny, Almén was not a universalist. He was aware of the practice of the German courts which had applied the law of the place of performance. In most cases this had led to the *lex fori*. In his view the theory that the *lex fori* applied could never have survived as it did, openly or in disguise, if basically it had not been well justified.

(ii) *Legal systems of today*. — Since the 1960s the West German courts have made less and less use of the place of performance as the connecting factor. Cases which have clearly endorsed the application of two legal systems to the same contract have not been reported since 1959⁶⁸. It is not likely to reappear now that the Federal Republic has enacted and put into force the Rome Convention which in principle does not endorse splitting.

Almén's influence on the Swedish courts was not significant and today the Scandinavian courts do not split the contract⁶⁹. The Swiss courts have abandoned the technique of splitting and French⁷⁰ and English⁷¹ courts have never adopted it. American case law shows no clear signs of splitting the contract in spite of the tendency to

practise a *dépeçage*⁷². The arbitration commissions of the East European Socialist countries have never split the contract, and several provisions of the Czechoslovak and Polish laws on private international law imply the application of a unitary choice of law rule⁷³.

(iii) *Criticism*. — In the opinion of the present writer the practice of splitting leads to an artificial division of the contract, which is and must be upheld as a unit. The harmony between the obligations of the parties to a bilateral contract is disturbed if different laws are applied to the two obligations. The German cases show how difficult it has been to classify a legal question as one concerning a party's obligations or as one concerning its rights. Does, for instance, the termination of a contract of sale by the buyer on the ground of the breach of a condition, imply an obligation for the seller to take the goods back and to return the price, if already paid, or does it imply a modification of the buyer's obligation to pay the price? The German courts have always held the latter view and have applied the law of the place where the buyer had to pay the price, even when it was to be repaid by the seller. On the other hand, they have held that a claim by the buyer for damages on the ground that the goods sold were defective involved an obligation of the seller and that the law of the place of delivery applied. These are, as Nussbaum said, "intolerable artificialities"⁷⁴.

If, according to the law of country A, the risk for loss of or damage to goods sold passes to the buyer when the contract has been concluded while according to the law of country B it passes upon delivery to the buyer, and the goods are lost after the contract was concluded and before the goods were delivered, the question arises as to who must bear the loss, if the obligations of the seller are governed by the law of A and those of the buyer by the law of B. The conflict is hard to solve. The view held by von Bar and Almén⁷⁵ that the seller should bear the risk if the price has not been paid, does not provide a just solution to the problem.

It may be true that each party expects his own law to govern, but this expectation applies to the contract as a whole and not only to his own obligations. In international contracts, however, which are concluded between residents of different States or countries the expectation of both parties cannot be fulfilled. One law must govern.

2. Choice of Law by the Parties

(a) Terminology

(i) *Party reference and incorporation.* — This part deals with the express and the tacit choice of law by the parties. The question whether the implied or presumed intention of the parties will determine the proper law of the contract is treated in the following part 3. The main problem to be examined in this part is whether, and if so, to what extent the parties are free to choose the proper law of the contract. This freedom, the party autonomy in the conflict of laws of contracts, will first be discussed country by country, and will then be dealt with in the light of the various problems which arise; the various answers given to the problems connected with the choice of law by the parties will be confronted and an attempt at an evaluation will be made.

In discussing party autonomy it is convenient to make a distinction between a party reference or choice of law and incorporation. The distinction was first proposed in Germany⁷⁶ and was accepted later on in other parts of the world⁷⁷.

A *party reference* is an express or tacit choice of law which constitutes the connecting factor. It forms part of the conflict rule of the *forum* which renders applicable the law so chosen⁷⁸. When making their choice of law the parties submit the contract to the chosen law.

This choice of law or reference is to be distinguished from what is called *incorporation* of foreign law. Parties contracting under French law as the proper law of the contract may shape their contract as they desire within the limits set by the mandatory rules of French law. This they may do either by defining the desired conditions in express terms or, more succinctly, by referring to the provisions of a foreign legal system, for instance English law, which they seek to apply wholly or partially. The latter is an incorporation⁷⁹, of foreign law. It presupposes a proper law different from that to which the reference is made and derives its validity from the provisions of the proper law, here French law, not from the conflict rules of the *forum*.

(ii) *Significance of the distinction.* — The difference between incorporation and party reference becomes relevant when it is necessary to determine whether mandatory rules of a legal system that

normally would be applicable under the conflict rules of the *forum* shall be disregarded if the parties agree to apply the law of another system⁸⁰. If there is a party reference, the mandatory requirements of legal systems other than that selected by the parties are disregarded; if there is an incorporation, the mandatory rules of the proper law of the contract designated by the conflict rules of the *forum* apply, and the provisions of the law selected by the parties apply only to questions which in the proper law are regulated by directory rules.

This distinction, though criticized by some authors⁸¹, has its merits⁸². The most important question connected with the freedom of the parties to choose the law of a contract, namely whether the freedom should be restricted to laws connected with the subject-matter, arises only in connection with party references. There can be no objection to an incorporation of parts of a legal system not related to the matter, if the validity of such reference is derived from the proper law of the contract and does not exceed the limits set by the substantive rules of that law.

(b) *Historical development, party intention replaced lex loci contractus*

The writings of Dumoulin and Huber in the sixteenth and seventeenth centuries contain, *in nuce*, the idea of resorting to the intention of the parties. Thus Huber was cited in *Robinson v. Bland*, one of the first English cases where the question of the application of foreign law was raised, and where Lord Mansfield is reported to have said:

“The parties had a view to the laws of England. 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 . . .⁸³.”

Early in the nineteenth century the Danish writer Ørsted referred to the intention of the parties as the basis of the rules which he established⁸⁴ and so did most contemporary Continental and American authors⁸⁵. In some French⁸⁶, German⁸⁷ and American⁸⁸ cases dating from that period the same explanation is found. Reliance on the intention of the parties became the governing principle when for reasons of economics and commercial convenience the place of

contracting lost its paramount significance in the latter part of the nineteenth century, see *supra*, Chapter I, 3 (c).

(i) *England*

(1) *Origin of the theory of free choice.* — The first country in which reliance on the intention of the parties was clearly established as the governing principle was England. Two decisions to this effect were rendered in 1865, *Peninsular and Oriental Steam Navigation Co. v. Shand*⁸⁹ and *Lloyd v. Guibert*⁹⁰.

The reasoning in the first decision seems to have been influenced by the American writer Story whose *Commentaries on the Conflict of Laws* had first appeared in 1834. Story, like Continental writers earlier, explained the choice of the *lex loci contractus* by reference to the intention of the parties:

“The ground of this doctrine (respecting formalities) is that every person, contracting in a country, is understood to submit himself to the law of the place, and silently to assent to its action upon his contract.”

Story did not, however, rely on this explanation alone and added:

“It would, perhaps, be more correct to say that the law of the place of 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 and property and transactions within its own territory⁹¹.”

By this addition to the first sentence Story had brought himself into line with the Dutch writers (see *supra*, Chapter I, 3 (b)).

In *P. & O. v. Shand* the same dual reasoning occurs. The point at issue was the validity of a clause in a passenger ticket exempting the carrier from liability for the negligence of the crew. The stipulation was valid in English law, which was the law of the place of contracting, but invalid by the law of the place of performance, the island of Mauritius. Turner, L.J., began in the same vein in which Story had ended:

“The general rule is that the law of the country where a contract is made governs . . . The parties to a contract are either the subjects of the Power there ruling or as temporary residents owe it a temporary allegiance.”

Then he added: "In either case equally they must be understood to submit to the law there prevailing, and to agree to its actions upon their contract⁹²." This seems to have been his main point, for he went on carefully to show that it must have been the intention of the parties to submit their contract to the law of England, the main argument being that the carrier would never have accepted the law of Mauritius.

(2) *Lloyd v. Guibert* and *In re Missouri Steamship Co.* — The question remains why this dual reasoning was necessary. If, as Story had put it, the law of the place of contract "acts upon it, independently of any volition of the parties" it would have been superfluous to call upon the volition of the parties to explain the outcome. It seems, however, as if Turner, L.J. only paid lip service to "the general sovereignty to regulate all transactions"⁹³, and in *Lloyd v. Guibert* it was stated, more boldly, that

"it is necessary to consider by what general law the parties intended that the transaction should be governed or rather to what general law it is just to presume that they have submitted themselves in the matter⁹⁴".

The sovereign and the law of the place of contracting acting independently of any volition of the parties were not mentioned.

P. & O. v. Shand and *Lloyd v. Guibert* seem to have established the principle of party autonomy in English law. It may be objected that these cases do not provide the proof that autonomy now reigned in England. In *P. & O. v. Shand* the court applied the law of the place of contracting, as had been done in previous cases. It was the reasoning and the reasoning only that was new. In *Lloyd v. Guibert* no mandatory rules of the laws in question were involved. Here, however, the law of the flag was applied; the party-intention rule was clearly established and the law of the place of contracting was not applied. Since English lawyers at that time paid little attention to the distinction between directory rules and mandatory rules, so important in continental law in the debate about party autonomy, it is probable that the principle established in the two cases covered both sets of rules.

Furthermore, it was held *In re Missouri Co.*⁹⁵, decided in 1889, that the intention of the parties may eliminate the application of mandatory rules of the law of the place of contracting. A *dictum*

in that case indicates, however, that considerations of the sovereign power involved still affected the court⁹⁶. It was indicated that if the exemption clauses involved had been *illegal* by the law of the place of contracting in the United States, they would not have been given effect, even if valid according to English law, which applied as the law of the flag. Since in the opinion of the court they were only *void* according to American law, their invalidity under that law could be disregarded, seeing that English law applied as the law of the flag which the parties were presumed to have intended to apply.

(3) *The background of the free choice theory.* — The courts in England had several reasons for using the intention of the parties as the decisive criterion: party autonomy was supported by the *laissez-faire* philosophy of the nineteenth century and in accordance with that philosophy the intention of the parties played a great part in the English law of contracts⁹⁷.

The intention of the parties was also thought to be a good argument for the application of the *lex validitatis*. The English courts could, for instance, evade the mandatory liability rules of the American Harter Act concerning carriage of goods by sea if they could show that the parties intended the more liberal English law to apply.

The best quality inherent in party intention was, however, that it might be used as a way out of the former system of fixed rules (see *infra*, 3 (b) (i) (1)).

Among the legal writers of that time Westlake would not rely on the intention of the parties⁹⁸, but Dicey⁹⁹, being loyal to English case law, favoured party autonomy albeit with some reluctance¹⁰⁰ in the first edition of his *Treatise on the Conflict of Laws*.

The intention of the parties was established as the decisive choice-influencing consideration at a time when this intention was rarely expressed in the contracts. When later on choice-of-law clauses became frequent the courts paid heed to them. In the tenth edition of Dicey's textbook dated 1980 it is still maintained that "When the intention of the parties to a contract . . . is expressed in words, this expressed intention, in general, determines the proper law of the contract"¹⁰¹.

(4) *The choice must be "bona fide and legal"*. — In modern times the extent to which the law chosen by the parties may govern their contract has been a moot point both in practice and in theory. It

was tested in the famous case *Vita Food Products, Inc. v. Unus Shipping Co. Ltd.*¹⁰².

A bill of lading issued in respect of a shipment from Newfoundland to New York in a vessel registered in Nova Scotia contained a choice-of-law clause referring to English law. The Privy Council upheld the clause even though the contract had no local contact with England. Consequently English common law applied, since the provisions of the Hague Rules, which were incorporated into English law by the Carriage of Goods by Sea Act 1924 applied only in respect of shipments out of a country. The defendants could thus rely on an exemption clause which was expressly declared illegal and void by the Hague Rules as enacted in Newfoundland and in all the other countries connected with the contract. It seems to have been very doubtful whether the Hague Rules and similar statutes in the countries which had local connection with the bill of lading would have deprived the defendant shipowner of the benefit of the exemption clause but this question was not treated by the Privy Council. Lord Wright maintained that the reference to English law by the parties should be respected because it was "*bona fide* and legal". In his words: "Connection with English law is not as a matter of principle essential" (p. 290). Arbitration in London and the application of English law is very often provided for in international contracts.

"... [T]hose familiar with international business are aware how frequent such a provision is even where the parties are not English and the transactions are carried on completely outside England¹⁰³".

These words of Lord Wright may contain the explanation of the position of the Privy Council. The English court intended to establish that in international commerce those who want to adopt English arbitration and English law are free to do so. They were not to be prejudiced by mandatory provisions of the *lex loci contractus* or of other laws even though the contract had no contact with England. English courts thus invited foreigners to stipulate for arbitration in England in accordance with English law¹⁰⁴. It will be interesting to see whether the English courts, like the French courts, will grant the parties the same liberty to select a foreign law as they have to select English law.

Though the *Vita Food* case has not yet been "distinguished

away", there have later been dicta in the English courts which seem to imply that parties may not choose a law which has no local contact with the contract¹⁰⁵. These dicta may have been delivered under the influence of Cheshire¹⁰⁶ and Morris¹⁰⁷ who opposed party autonomy with almost the same arguments as did Continental jurists of the preceding generation (*infra* (ii)) and who wanted to replace it with what they called "objective criteria". As Westlake had said, that law should always apply with which the contract has "its most real connection"¹⁰⁸. As far as the express choice of law is concerned, however, this theory does not yet seem to have been followed in any English case.

In the tenth edition of the influential book by Dicey and Morris, Collins says cautiously that local contact with English law is not always necessary. On the other hand, English courts will not invariably give effect to a choice of a law unconnected with the contract. The courts may prevent parties from evading the provisions of the law most closely connected with the contract. However, the fact that many commercial transactions which seemingly have nothing to do with England are insured and financed in the City of London, may make it desirable and legitimate for the parties to subject their transactions to English law although that law has nothing to do with the facts of the particular case¹⁰⁹. Collins is furthermore of the opinion that though the *Vita Food* case may not, as an authority, cover the selection of a law other than English law, its principle would also apply to an express and reasonable choice of a foreign law as the proper law of the contract not visibly connected with the foreign country in question¹¹⁰.

Until 1973 there were no indications that the English courts or the English Parliament would treat consumer contracts or contracts tainted with "dirigisme" differently from commercial contracts or "free contracts"¹¹¹. However, the Supply of Goods (Implied Terms) Act 1973 (c.13) and since 1985 the Consumer Credit Act 1974 has curtailed party autonomy as far as hire-purchase agreements are concerned. The Act provides that where the proper law of a hire-purchase agreement would, apart from a term that it should be the law of some other country or a term to the like effect, be the law of any part of the United Kingdom, or where any such agreement contains a term which purports to substitute or has the effect of substituting, provisions of law of some other country for all or any of the provisions of the Act containing a number of mandatory

provisions protecting the hire-purchaser, those sections shall, notwithstanding that term, apply to the agreement. The Sale of Goods Act 1979 also protects the buyer to a sale of goods and especially a consumer through a number of mandatory provisions, and a provision restricting the operation of choice-of-law clauses is found in section 56 (1) of that Act. However, the protection of the Act only covers internal and not international sale of goods¹¹². Thus a British hire-purchaser getting goods from a foreign seller under a contract governed by the law of any part of the United Kingdom will be protected, whereas a merchant – and even a consumer – buying goods from a foreign seller under a contract which is not a hire-purchase will not be protected. In 1980 the United Kingdom has signed the Rome Convention on the Law Applicable to Contractual Obligations which in Articles 5 and 6 limits party autonomy in certain consumer contracts and in individual employment contracts, see *infra* (c) (iii) (6). The Convention has not yet (January 1988) entered into force in the United Kingdom.

(5) *Scotland and the Commonwealth countries.* – The attitude of the courts of Scotland¹¹³ and of the Commonwealth countries to party autonomy seems to be the same as that of the English courts. This conclusion is valid not only for the countries in which the decision of the Privy Council in the *Vita Food* case is an authority, but also for other Commonwealth countries¹¹⁴.

(ii) *France*

(1) *Cases versus writers.* – In France the unqualified recognition of party autonomy was pronounced in 1910 by the Court of Cassation which stated that “the law governing contracts, their formation, their conditions and their effects, is the law which the parties have selected”¹¹⁵. Assuming the parties to have adopted French law to govern a bill of lading, the court refused to apply the mandatory Paramount Clause of the Harter Act which prevailed at the port of loading (New York) and, consequently, a clause in the bill of lading exonerating the French carrier from liability was upheld in accordance with French law.

This recognition of party intention followed a long period of hesitation which may have been due to the violent criticism levelled at the theory of party autonomy by French writers. Mailher de Chassat opened the attack as early as in 1841 :

“The great error in this theory is that you rob the law of its essential purposes: to govern all interests, to reign in sovereignty, for the common benefit, over all individual desires. Instead, the will of the private person has been elevated above the law; a presumed intention has been made Master of the Law, has swallowed the law and all its Majesty and Authority; the Public Interest has been rendered null and void ¹¹⁶.”

This argument that the law must prevail over the private will persuaded the jurists of the European continent. The intention of the parties was incapable from a logical point of view of selecting the governing law because there did not exist any legal system which gave effect to that intention; moreover the scope of the substantive rule of law was for reasons of policy not to be enlarged or curtailed by the parties. It was left to the sovereign to decide that scope according to the social purposes of the law ¹¹⁷.

(2) *Party autonomy in international contracts*. — The French courts paid less and less heed to the seemingly cogent arguments of writers. In two cases decided in 1930 and 1931 the Court of Cassation stated that a choice of law was permissible when the interests of international trade were at stake ¹¹⁸. The facts of the two cases and the reasoning of the court show that a close local contact with the chosen legal system was not necessary provided the contract was international in character ¹¹⁹. The emphasis placed by the court on interests of international commerce came to exercise influence also upon the developments outside France ¹²⁰.

(3) *Batiffol and “la loi d’autonomie”*. — In modern times the efforts of Batiffol to reconcile the antiautonomist view with a recognition of the parties’ choice of law has attracted much attention both in France and in other countries ¹²¹.

Batiffol has shown how, owing to the need of the courts to obtain flexibility, the intention of the parties achieved a dominant influence before any individual party had considered the possibility of inserting a choice-of-law clause in a contract ¹²². Reliance on the presumed intention led, however, to arbitrariness and uncertainty in cases where the parties had failed to make a choice of law ¹²³, and in cases where a choice had been made the acceptance of this express intention made the parties masters of the law. Batiffol refuses to accept a choice of law by the parties as a binding agree-

ment. Parties are subject to the law and are not its masters¹²⁴. They cannot select the legal system governing their contract. Batiffol also emphasizes the growing importance of mandatory rules, the increasing *dirigisme* in the substantive law of contracts¹²⁵. To a larger extent than previously, many contracts are now governed by rules intended to protect the weaker party¹²⁶. This *dirigisme* must inevitably have some impact on the freedom of the parties in the conflict of law.

Nevertheless Batiffol calls the law applicable to a contract the "law of autonomy" (la loi d'autonomie). In his view, the parties cannot choose the applicable law; this must be left to the courts, but the parties localize the contract in some State or country by selecting the place of contracting, the place of performance or some other relevant contacts. This freedom of the parties to localize the contract must be recognized. The courts will then select as the law of the contract the law of the place where the contract is located¹²⁷. Batiffol claims to have found support for this theory in Continental and — above all — in American case law.

(4) *Later developments in France.* — However, the freedom of the parties to choose the applicable law has had the support of other modern writers such as Jacques Donnedieu de Vabres¹²⁸, Lerebours-Pigeonnière and Pierre Mayer¹²⁹. Since 1910 the French courts have maintained that the law of the contract is that one chosen by the parties¹³⁰.

Apart from limiting the choice of law to international contracts the Hague Convention on the Law Applicable to International Sales of Goods of 1955¹³¹, Article 2, paragraph 1, to which France is a party, lays down no other requirements. The French courts have allowed a choice of English law in contracts closely connected with France and having only a slight contact with England¹³². They have not yet stated expressly whether, and if so, how they would limit the parties' freedom to choose the applicable law¹³³. Having stressed the interests of international commerce it seems as if they would uphold a choice of law when it is supported by these interests. At least it seems likely that they would not uphold a choice made *in fraudem legis*¹³⁴. The Rome Convention, which has been ratified by France but not yet (January 1988) put into force provides that a contract shall be governed by the law chosen by the parties (see Article 3 (1)).

Even in cases where the type of contract in question was regulated by important mandatory provisions protecting the weak party the French courts have spoken in terms of the intention of the parties¹³⁵. The public interest and the protection of the weak party have been safeguarded by the principle of public policy, *l'ordre public*, the related principle of territoriality, and by those French substantive law rules which have or are considered to have defined their own sphere of application in international relationships¹³⁶, the so-called *directly applicable rules of law*. However, these devices have led French courts to consider the mandatory requirements of French law only and not those of foreign countries.

(iii) *Belgium and the Netherlands*

(1) *Belgium*. — Party autonomy was affirmed in a decision of 24 February 1938 by the Belgian Court of Cassation. Like the French Court of Cassation in its decision of 5 December 1910 mentioned above, the Belgian court stressed the autonomy of the parties as the prevailing principle both for cases in which the intention had been expressed, and for those in which it had to be presumed: "The law governing contracts, their formation, their conditions and their effects, is the law which the parties have selected¹³⁷." The case concerned bonds which were issued in New York by the City of Antwerp. As in the French case the parties had not made any express choice of law. Their intention to apply the American Joint Resolution of 1933 abrogating gold clauses was gathered from the circumstances of the case. In several later decisions Belgian courts have maintained the principle of party autonomy¹³⁸. In spite of the fact that the decision of 1938 caused some uncertainty later decisions¹³⁹ show that the Belgian courts will recognize a choice of law as a party reference and not merely as an incorporation of foreign law. This is also the view of Belgian authors¹⁴⁰.

The question whether the parties may choose the law of a country unconnected with the contract has not yet been the subject of judicial determination, as far as can be ascertained. Rigaux (No. 1121) is, however, of the opinion that in international commercial contracts the parties' choice should be unlimited. As far as the sale of movables is concerned this follows from the Hague Convention on the Law Applicable to International Sales of Goods, Article 2 to which Belgium is a party. However, in accordance with the Rome Convention Belgian authors maintain that public policy rules of a

country – be it the *forum* or a foreign country – which is closely connected with the contract may claim application to the issue and may thus set a limit to the autonomy of the parties¹⁴¹.

(2) *The Netherlands*. – Until after the Second World War it was uncertain whether the courts of the Netherlands would accept party autonomy. In 1947, the Dutch Supreme Court in a *dictum* recognized the freedom of the parties to choose the applicable law¹⁴², but only in 1966 in the *Alnati* case party autonomy formed the *ratio decidendi* given by that court¹⁴³. The Dutch rules of the conflict of laws are not embodied in statutes, and before 1963 the Hoge Raad had no jurisdiction to review the application by the lower courts of rules other than statutory provisions. However, in his monograph on *Choice of Law by the Parties in the Dutch Conflict of Laws of Contracts* published in 1965, Deelen (p. 302) was able to show that before 1963 party autonomy had figured not only in *dicta* but also as the *ratio decidendi* in judgments of the lower courts.

In the *Alnati* case a cargo of potatoes had been carried on a Dutch motor vessel, *The Alnati*, from the Belgian port of Antwerp to Rio de Janeiro. The potatoes were damaged when they arrived. The bills of lading provided that the contract of carriage was “governed by Netherlands law subject to what is provided in the Bill of Lading”. Belgian law provided that every bill of lading issued by a ship departing from a Belgian port or entering a Belgian port was governed by the Belgian rules on bills of lading (the Hague Rules). The problem was whether the Belgian Hague Rules or the more lenient Dutch rules on the liability of the carrier applied.

The lower courts had applied Belgian law. The Court of Appeal had based its decision on the conception that a contract, notwithstanding a party reference to another law, remains subject to the mandatory provisions of the legal system applicable to the contract in the absence of such a reference and had found that this was Belgian law.

The Hoge Raad, however, held that this conception was not in conformity with Netherlands private international law

“according to which parties to a contract which, like the contract before the court, bears an international character are in principle permitted to select *in toto* a legal system other than that to be applied under the conflict rules obtaining in the

absence of such choice of law by the parties, and according to which such a choice of law, in so far as the law does not raise objections thereto means that the contract is governed only by the law so chosen, to the exclusion not merely of directory provisions but also of the mandatory provisions of other legal systems including the legal system which would have had to be applied to the contract in case no choice of law had been made by the parties; that hence, even where the present contract of carriage may have connecting factors with Belgian law of such a nature as to make Belgian law applicable in the absence of a selection of the applicable law by the parties, mandatory Belgian municipal and conflict rules, now that the parties have selected Netherlands law as the law governing their contract, do not in principle constitute a bar to the Netherlands' judiciary applying Netherlands law as agreed upon even though this law may deviate from mandatory Belgian provisions; that in connection with contracts such as that under discussion it may occur that compliance also outside the territory of a foreign State with provisions emanating from that State involves such important interests of the State in question that the Netherlands judiciary too has to take them into consideration and therefore must apply such provisions in preference to the law chosen by the parties and emanating from some other State, but that the Belgian provisions applied by the Court of Appeal in the present case, are not of such nature that the Netherlands judiciary, with an eye to the Belgian interests involved, is bound to give them preference over Netherlands law chosen by the parties . . .¹⁴⁴"

More decisively than many courts the Hoge Raad held that the choice of law by the parties is the decisive factor for the determination of the applicable law. The law of a country which is not the country most closely connected may be made the object not only of an incorporation but also of a party reference¹⁴⁵.

Dutch case law had hitherto left unanswered the question whether the parties may choose the law of a country with which the contract has no local connecting factors. Deelen in his commentary to the *Alnati* case maintains that the Hoge Raad has now held that the choice of law by the parties is unrestricted. In another comment to the decision Struycken, however, interprets the case and

especially the words that "the parties . . . are in principle permitted to select *in toto* a legal system other than that to be applied . . ." to mean that a Dutch court will give effect to the choice of Dutch law when the contract shows contacts with the Netherlands¹⁴⁶. It is submitted, that Deelen's interpretation comes closer to the wording of the decision than does Struycken's. It is also in accordance with Article 3 (1) of the Rome Convention 1980 which has been signed by Belgium and the Netherlands, but not yet put into force.

(iv) *West Germany and Switzerland*

(1) *Practice and literature in Germany before 1945*. — In Germany, from about 1880 onwards, a disagreement similar to that in France existed for more than a generation between the courts and writers. While von Savigny seemed to have favoured the choice of law by the parties, von Bar attacked it with almost the same arguments as the French authors had used, and Ernst Zitelmann and several others followed suit¹⁴⁷. The courts, however, were not convinced. From about 1880 and onwards it was said *obiter* by the German courts that in the first place the law chosen by the express will of the parties is to govern¹⁴⁸.

In 1930 Wilhelm Haudek showed that it was a conflict rule of the *forum* which gave effect to the choice of law by the parties. According to that rule the choice of law was the connecting factor that made the chosen law applicable¹⁴⁹. Thereby he supplied the rule of a party autonomy with its much needed theoretical foundation, a matter of importance on the European Continent.

Thereafter the attitude of the courts was supported by the writings of several of the leading authors such as Wolff, Nussbaum and Raape¹⁵⁰.

(2) *West German writers after 1945, Wolff, Raape and Gamillscheg*. — In their earlier writings before 1954 both Wolff¹⁵¹ and Raape¹⁵² had maintained that the choice of the parties should be limited to those legal systems with which the contract had local contacts, but later on they changed their views. Perhaps under the influence of English case law, especially the decision in the *Vita Food* case (*supra*, (i) (4)), Wolff in both of his two books on English and German private international law contended that a local connection with the chosen legal system was not necessary. It was sufficient that the choice was supported by "some sound idea of

business convenience and common sense”¹⁵³. In the fifth edition of his book Raape argued that the parties’ choice of law should be upheld whenever they could show a legitimate interest. In favour of this more liberal attitude he cited the 1955 Hague Convention on the Law Applicable to International Sales of Goods, Article 2 (which is not ratified by Germany), Wolff and Gamillscheg¹⁵⁴.

In the 1950s support for an almost unrestricted party autonomy was provided by Gamillscheg. In modern times, so Gamillscheg argues, choice-of-law clauses have become frequent; so have arbitration and jurisdiction clauses in international contracts, and these clauses are generally construed as tacit party references to the law of the chosen *forum*¹⁵⁵. Party references are recognized almost everywhere in the world¹⁵⁶. The fears of many theorists that autonomy will lead to evasion of the law which is otherwise applicable are unfounded. Evasions are almost non-existent in practice¹⁵⁷. The argument is not persuasive either that the law chosen may render the contract invalid; if the parties have chosen such a law they must bear the consequences of their mistake. The contract is void.

Gamillscheg makes no distinction between commercial contracts of international trade which are governed by few mandatory provisions and contracts which are regulated by important social and mandatory legislation. Party autonomy should govern both the commercial sale of goods and the labour contract. In the labour contract, however, autonomy only extends to what on the Continent is known as private law. Many aspects of labour law are rules of public law and these fall outside the scope of the proper law of the contract. They are mainly territorial¹⁵⁸.

The authors of the 1970s and 1980s support party autonomy in international contracts. They do not require the contract to have any local contact with the legal system chosen by the parties¹⁵⁹.

(3) *The German Act of 26 July 1986*. — The West German courts which shortly after the Second World War showed signs of ousting party autonomy from labour contract¹⁶⁰, retained it in the end¹⁶¹, probably due to the writings of Gamillscheg. German courts showed no signs of limiting party autonomy in contracts with consumers and other economically weak parties and in contracts “tainted with dirigisme”. Public policy, especially the “purpose of the German statute”¹⁶² and sometimes the principle of territoriality were the only protective devices used by the West German courts.

However, the West German Standard Contracts Act of 1976¹⁶³ applied to consumer contracts even where the contract was governed by foreign law, if the conclusion of the contract was preceded by advertizing or an approach in West Germany, and if the consumer had his habitual residence and made his consent to the contract in that country, see paragraph 12 and paragraph 24. Furthermore, a party reference to foreign law in a standard form contract might be disregarded if it was not supported by a legitimate interest (paragraph 10, No. 8). According to paragraph 24 this rule applied specifically to consumer contracts, but a party reference to foreign law might also be disregarded in other contracts in accordance with the general clause in paragraph 9 which renders inoperative clauses in standard contracts which are unduly prejudicial to the other party¹⁶⁴.

In 1986 the Federal Republic of Germany enacted the Rome Convention of 1980. This has been done by a separate Act on Private International Law of 25 July 1986¹⁶⁵, which also covers the general topics and torts, family, successions, etc. The new act has definitely discarded the presumed intention (Article 27, which reproduces Article 3 of the Rome Convention) and restricts party autonomy in individual employment contracts (Article 30, which reproduces Article 6 of the Rome Convention). As for consumer contracts paragraphs 12 and 10, No. 8, of the Standard Contracts Act of 1976 have been replaced by a provision (Article 29) similar to Article 5 of the Rome Convention. However, Germany has not enacted the provision of Article 7 (1) of the Rome Convention dealing with foreign mandatory provisions of a law which is not the proper law of the contract¹⁶⁶.

(4) *Switzerland and Austria.* — In the nineteenth century, during the first decades of its existence, the *Swiss Federal Tribunal* recognized party autonomy¹⁶⁷, but then it vacillated. The court was probably impressed by German and Swiss authors who attacked party autonomy with arguments founded on logic and policy¹⁶⁸. In 1906 the court drew a distinction between the formation and the validity of a contract and its effects¹⁶⁹. As far as the effects were concerned party autonomy remained. Formation and validity, on the other hand, were governed by the law of the place of contracting, and here party autonomy was excluded.

This attitude was attacked by several Swiss authors¹⁷⁰ and in

1952 in *Chevalley v. Genimportex S.A.* the court abandoned it. *Dépeçage* was abandoned in favour of the unity of contract and the full range of party autonomy was restored covering formation, validity and effects of a contract¹⁷¹. This meant an approximation of Swiss law to the laws of its neighbours. French, German and Italian law allowed the parties to choose the law governing the formation, validity and effects of the contract.

In the *Chevalley* case the Federal Tribunal said that a choice-of-law clause had effect only if the contract had "natural and somewhat important" contacts with the intended legal system, but this requirement was not repeated in the decisions of the following years and in *Adès v. Internationale Filmvertriebsanstalt* decided by the Bundesgericht in 1965 it was modified¹⁷². In that case the court intimated that no reason exists to limit the choice of law to those legal systems with which the contract is connected, for instance by the nationality or domicile of the parties or by the place of contracting or by the place of performance. Any reasonable basis for a choice-of-law clause is acceptable¹⁷³. In 1972 Switzerland ratified the Hague Convention on the Law Applicable to International Sales of Goods of 15 April 1955. Article 2 of the Convention is in accordance with the tenor of the decision in the *Adès's* case of 1965.

The draft Federal Act on Private International Law submitted in November 1982 provides that the contract is governed by the law which the parties have chosen (Article 113 (1)). It is not required that the parties' choice is supported by a legitimate interest or that the contract has any connection with the chosen legal system. However, like the other articles, Article 113 only applies to international and not to domestic situations, see Article 1. Furthermore, the parties cannot choose the law applicable to a consumer contract in cases where the consumer has been sought out by the supplier. The law of the consumer's habitual residence governs these contracts (Article 117). As for employment contracts, which are usually governed by the law of the place of work, the parties may choose another law but their choice is restricted to the law of the place of business of the employer, the law of the habitual residence of the employer, and that of the employee (Article 118)¹⁷⁴.

Contrary to paragraph 36 (1) of the Civil Code of 1811 which restricted party autonomy and which has now been repealed the

Austrian federal law on the conflict of laws 1978 gives full effect to the parties' choice of law in contracts containing foreign elements¹⁷⁵ (paragraph 35, and paragraph 1). There are restrictions on the parties' freedom to choose the applicable law only in some specific contracts. In case a supplier has sought out a consumer at the latter's residence the mandatory rules of the law prevailing there cannot be excluded to the detriment of the consumer (paragraph 41). Likewise the parties to an employment contract cannot exclude mandatory provisions of the law governing the contract, usually the law of the place of work, if this would be to the detriment of the employee (paragraph 44). Provisions of the *lex rei sitae* relating to the validity of contracts for the use of immovable property cannot be excluded (paragraph 42).

(v) *The United States*

(1) *Beale and the Restatement (1934)*. — In early American cases it was considered a principle of "universal law . . . that in every *forum* a contract is governed by a law with a view to which it is made"¹⁷⁶. Story emphasized that regard for the intention of the parties explained the rules governing the application of the law either of the place of contracting or of the place of performance which he propounded¹⁷⁷. Some states, however, used party intention as the governing principle, and this meant that the presumed intention of the parties decided the applicable law¹⁷⁸. In most cases this intention only led to the application either of the law of the place of contracting or the law of the place of performance. In some usury cases, for instance, the intention was relied upon in order to apply, from two legal systems, that which upheld the transaction¹⁷⁹.

Beale opposed party autonomy and gave as his reasons both the arguments of the European lawyers and the Anglo-American principle of territoriality¹⁸⁰: "The law operating upon the acts of the parties created the duty, established the privity and implies the promise and obligation on which the action is founded¹⁸¹." According to Beale the general rule is that the *lex loci contractus* determines the nature and legal quality of the acts done. The parties cannot select the law because they cannot have power to legislate for themselves. Besides, party references to a legal system only encourage litigation because the parties will not know whether the courts will accept the choice of law¹⁸². The Restatement of the

Conflict of Laws 1934 which mainly followed Beale's ideas did not mention the intention of the parties at all.

(2) *The judicial practice after Beale.* — Beale's opposition to party autonomy was followed in a few American cases, for example, in *dicta* by Judge Learned Hand of the Second Circuit Court of Appeals dating from about 1930¹⁸³, but it was hardly ever supported by the United States Supreme Court. In *Lauritzen v. Larsen*¹⁸⁴ it was said by Justice Jackson that the tendency of the law is to apply in contract matters the law which the parties intended to apply. In *Siegelman v. Cunard White Star, Ltd.* the arguments of Beale against party autonomy were disposed of by Judge Harlan¹⁸⁵:

"Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsmanship which relieves courts of problems of resolving ambiguities. To say that there may be no reduction in litigation because courts may not honor the provision is to reason backwards. A tendency toward certainty in commercial transactions should be encouraged by the courts."

The choice of law by the parties has never been completely unrestricted in the United States. If the choice-of-law clause was obtained by unfair means or written in a language unknown to the other party the courts have, as for instance in *Fricke v. Isbrandtsen Co.*¹⁸⁶ paid no heed to it. In some cases lack of local contact with the chosen legal system led the courts to disregard the choice-of-law clause, and they have said *obiter* that they will give no effect to a reference to a law that has "no normal relation"¹⁸⁷ to the contract or to a choice that was made "to avoid applicable law"¹⁸⁸. However, in several of these cases it was not clear whether lack of local contact or the intention to avoid the applicable law was the decisive criterion. In other cases the choice-of-law clause was disregarded because some fundamental policy of the *lex fori* rendered the latter applicable¹⁸⁹.

(3) *Contracts tainted with "dirigisme" and free contracts. Insurance contracts.* — In a number of cases a choice-of-law clause pointing

to the law of one state was set aside because the court enforced a fundamental policy of another state. This has mostly happened in contracts tainted with *dirigisme*, such as insurance contracts. References to the permissive law of a liberal state have been set aside in order to apply the protective statutes of a less liberal state.

State and federal courts have applied the law of the domicile of the insured party in *life insurance* contracts when that law gave the insured party a better protection against the insurance company than the law of the domicile of the company or the law of the place where the contract had been concluded¹⁹⁰. In most of the cases the courts did not say that they applied the law of the insured party's domicile because of its protective statute. They used other methods; they asserted, for instance, that the contract was governed by the law of the place of contracting but construed the domicile of the insured to be the place of contracting¹⁹¹. Party references to a more liberal law were not infrequently set aside¹⁹². In contracts for fire, surety, and casualty insurance a tendency to apply the protective statutes of the place where the risk was located has also been noticeable¹⁹³. In marine insurance contracts, however, the courts have upheld the choice-of-law clauses if there was a reasonable basis for the choice. It seems that in these international contracts where the location of the contract and the risk are difficult to define the parties' need for certainty as to the applicable law and their need for freedom of bargaining have persuaded the courts of the utility of choice-of-law clauses¹⁹⁴.

(4) *Employment contracts*. — In employment contracts choice-of-law clauses have sometimes been disregarded in order to apply a protective statute of another state. This has been noticeable in workmen's compensation cases. Since the middle of the 1930s the federal courts have tolerated the application by the state courts of their own statutes provided that the contract had a reasonable contact with the *forum*. One of the first leading cases was *Alaska Packers Association v. Industrial Accident Commission of California*¹⁹⁵. The parties had inserted a choice-of-law clause referring to the workmen's compensation law of Alaska, where all the work was to be done and where the injury was suffered. The employee had, however, made the contract in California with a Californian employer and had in accordance with the terms of the contract

returned to that state after the termination of the working period. The Californian Workmen's Compensation Act was applied by the Californian courts which, for practical reasons, did not apply the Alaska statute¹⁹⁶. The decision was affirmed. The Supreme Court pointed out, *inter alia*, that the workman would get fair compensation through application of the Californian statute whereas his possibilities of getting back to Alaska and there prosecute his claim for compensation under the Alaskan statute were small.

In cases concerning employment and in the life, casualty and fire insurance cases mentioned above, the policy differs to a remarkable degree from the policy which the American courts pursue in contracts concerning mercantile sales of goods, commercial loans, agency and marine insurance. In these latter cases the trend has been the reverse of that followed in the workmen's compensation and the insurance cases. The parties' choice of the validating law has been upheld. Here validation has been thought more important than protection¹⁹⁷.

Thus a distinction in the treatment of choice-of-law clauses between contracts tainted with *dirigisme* and "free" contracts is a noteworthy feature of American case law.

There are indications that the courts will not only help the weak party to a consumers contract to avoid an onerous choice-of-law clause when the contract is in standard form but also where an individual contract had been drawn up in a particular case¹⁹⁸. The American courts seem to base their distinction between permissible and non-permissible choice-of-law clauses, *inter alia*, on whether the contract is a commercial contract between two enterprises of supposedly equal bargaining power or a contract between a powerful enterprise and a supposedly weak party.

(5) *Restatement 2d (1971)*. — The Restatement 2d (1971) attributes paramount importance to party autonomy. Section 187, paragraph 2, provides that the local 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 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 paragraph 188 (state of the most significant relationship to the transaction) would be the state of the applicable law in the absence of an effective choice of law by the parties.

The comments to section 187 indicate that a fundamental policy is a stronger policy than that which confers a mandatory character only upon a provision. Rules concerning formalities, the capacity of married women and the requirement of consideration are cited as mandatory rules which do not express a fundamental policy of the enacting state. A choice-of-law clause will be upheld even if the issue is one which is regulated by such mandatory rules according to the law which is applicable otherwise¹⁹⁹.

The choice of law may be upheld even if the contract has no local contact with the chosen state. It seems that section 187 will uphold a choice of law when the parties show a legitimate interest in the application of the law chosen²⁰⁰.

Section 187 does not reflect the distinction between more or less, free contracts and between commercial contracts and consumers contracts mentioned above²⁰¹. The distinction is, however, noticeable in the two sections dealing with insurance contracts. The other sections concerning contracts state that "in the absence of an effective choice of law by the parties, (the contract is governed) by the local law of the state where . . ." ²⁰². In section 192 on life insurance contracts this reservation is formulated differently. The validity of a life insurance contract issued to the insured upon his application and the rights created thereby are *prima facie* determined "in the absence of an effective choice of law by the insured in his application" by the law of the domicile of the insured. In the comment it is said that effect will not be given to a choice-of-law clause designating a state whose local law gives the insured less protection than he would receive under the law otherwise applicable which will usually be the law of the state where the insured was domiciled²⁰³. Life insurance contracts are matters of intense public concern as is evidenced by the fact that they have been subjected to extensive statutory regulation by the great majority of American states. A major purpose of legislation in this area is to protect the individual insured and his beneficiaries and the courts have sought to assist in the achievement of this purpose by means of their choice-of-law rules²⁰⁴. Furthermore, life insurance contracts are

drafted unilaterally by the insurer and the insured is then given the opportunity on a "take-it-or-leave-it" basis of adhering to the terms. If, however, the insured is given the option between having the contract governed by the law of his domicile or by the law of some other state, and expressly chooses the law of the other state in his application, then effect should be given to his choice if the requirements of section 187 are satisfied²⁰⁵.

The comment mentions that choice-of-law provisions contained in group life insurance policies are more likely to be given effect than if contained in ordinary life insurance contracts. The organization or individual who procures the master policy will usually have a stronger bargaining position than an individual insured and therefore the choice-of-law provision may not have the same "take-it-or-leave-it" character as has the same provision in an ordinary life insurance policy²⁰⁶.

In section 193 dealing with contracts for fire, surety or casualty insurance choice of law by the parties is not mentioned. This contract is *prima facie* governed by the law of the state where the parties assumed the insured risk to be principally located. The reasons stated for omitting any reference to the choice of law by the parties are the same as those which led to its admission in a modified form in the section on life insurance contracts²⁰⁷. In the comments it is said that effect is more likely to be given to a choice-of-law provision where the insured enjoys a relatively strong bargaining position, and reference is made to the comment on group life insurance policies²⁰⁸.

It seems that the inequality of bargaining power is the main consideration behind the unfavourable attitude of these two sections towards party autonomy. The same consideration, however, seems to apply to employment contracts, to contracts concerning small loans, etc., but restrictions on party autonomy are not found in the sections concerning these contracts²⁰⁹. Here the general reservation in section 187 in favour of the fundamental policy of the otherwise governing law may prevent hardship to the weak party. This fundamental policy, however, will not bring the entire contract under the otherwise governing law as it will in sections 192 and 193. Only the relevant provision of the local law which expresses the policy applies. In other respects the contract is still governed by the chosen law, and this may, as mentioned above, 1 (a) (vii), lead to a *dépeçage* of the contract.

(6) *Uniform Commercial Code*. — The Uniform Commercial Code (UCC) which has now been adopted by every state of the Union has introduced common conflicts provisions for sales, commercial paper, letters of credit, warehouse receipts, bills of lading, and other documents of title. For these commercial contracts party autonomy already accepted by the courts has been upheld. According to the UCC, section 1-105, the parties may choose the law of a state or nation bearing a reasonable relation to the contract. According to the official comment this means that in sales and in the other contracts covered by the clause the law chosen must (ordinarily) be “that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs”. But, it is then said,

“an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen ²¹⁰”.

This comment leaves some questions open. May the courts give effect to a choice by the parties of the law of a country or state having no local contact with the contract? May they do so even if by the law of the country or state most closely connected with the contract the particular issue is one which the parties could not have resolved by an explicit provision in their agreement? May, for instance, a New York firm selling goods to a German firm in a contract made in New York and to be performed there agree with the purchaser to apply English law with the effect that mandatory rules of New York law are excluded? Will the existence of a much-used English form to which the parties have referred and which contains a provision that English law governs be a reasonable enough relation ²¹¹?

For other contracts and relationships regulated by the code, namely bank deposits and collections, bulk transfers, investment securities, secured transactions, sales of accounts, contract rights and chattel paper, the code has provided special conflict rules ²¹². An agreement to the contrary is effective only to the extent permitted by the law specified in these provisions. This also applies to the rights of creditors regulated in part 4 of the article on sales, see the UCC, section 2-402.

(vi) *Scandinavia*

(1) *Denmark*. — Several opinions of Danish Supreme Court Judges pronounced in this century did in fact indicate that they favoured party autonomy even in matters where mandatory rules were involved. These opinions, however, were not published with the decisions²¹³. In the published grounds of decisions of the lower courts the presumed intention of the parties was invoked to determine which law is to govern an international contract. In 1964 Denmark ratified the Hague Convention on the Law Applicable to International Sales of Goods of 1955 and in 1984 it put into force the EEC Convention on the Law Applicable to Contractual Obligations of 1980²¹⁴. Both conventions give the parties to an international contract an unrestricted freedom to choose the applicable law, see *infra*, (viii).

(2) *Norway*. — In *Stavanger Sparekasse v. State of Norway*²¹⁵, the *Norwegian Gold Clause* case, the judge speaking for the Supreme Court of Norway, said:

“As to the question whether the relationship between the bond owners and the Norwegian State (the debtor) is to be governed by Norwegian law or by the law of New York (where the bonds had been issued), I note that the bonds themselves do not contain any clause as to the applicable law. According to the prevalent view it is necessary in these circumstances to find the law having the most intimate connection with the contract, all things considered . . .”

The issue was whether or not the mandatory American rules abrogating gold clauses applied, and the *dictum* of the Supreme Court²¹⁶ and other Norwegian courts²¹⁷ also indicate that an express and a tacit choice-of-law clause is recognized and given effect.

(3) *Sweden*. — The same view as was expressed in the *Norwegian Gold Clause* case was stated by the Swedish Supreme Court in an analogous case, *Försäkringsaktiebolaget Skandia v. Riksgäldskontoret*²¹⁸. In *Bergstedt v. Kreuger & Toll*²¹⁹, decided simultaneously with the *Skandia* case, the Supreme Court was faced with the problem whether the American Joint Resolution abrogating gold clauses applied to bonds issued by Kreuger & Toll in the United States, which contained a clause designating American law as the governing

law. The Joint Resolution was applied in spite of the fact that the bonds had been issued, the defendant debtors Kreuger & Toll had become bankrupt, and the claims of the bond owner, Bergstedt, had been registered with the Swedish bankruptcy court before the Joint Resolution was passed in the United States. The Supreme Court, however, maintained that the choice-of-law clause also covered changes in the American law after the bonds had been issued and the debtors had gone bankrupt, and that the Joint Resolution applied. The decision shows that the chosen law is the law governing the contract throughout its existence. Parties are also bound by later changes of that law.

(4) *Party autonomy is recognized.* — Thus it seems that the freedom of the parties to choose the law is assumed and recognized in Sweden and Norway. The decisions show that a choice-of-law clause makes the chosen law the legal system governing the contract; the parties are bound by its mandatory rules²²⁰ and cannot deviate from them even if another law connected with the contract would allow them freedom of contract, and the parties are bound by later changes in the chosen legal system²²¹. Party autonomy is also favoured by the authors, for example by Gaarder in Norway²²² and by Nial, Eek and Bogdan in Sweden²²³.

(5) *Contact requirements or legitimate interest.* — There is no clear-cut Norwegian and Swedish decision on the question whether a local contact with the intended legal system or a legitimate interest of the parties in its choice will be required.

In Denmark the question has now been solved by the Rome Convention 1980 which does not require a local contact with the intended legal system. As for Finland, Norway and Sweden it is likely that the position taken in the Hague Sales Convention 1955 will lead the courts of these countries to accept a choice of any law be it connected or not with the contract when the latter is a free and commercial contract. Some Swedish authors have maintained that the same freedom of choice which the parties enjoy in respect of free commercial contracts should not be accorded to them in respect of contracts tainted with *dirigisme* and of consumer contracts²²⁴. This idea has been endorsed in a decision by the Swedish Market Court in 1973²²⁵ and in the explanatory statements accompanying the recent bills on consumer insurance²²⁶ and employment contracts²²⁷.

(vii) *Socialist countries*

(1) *The Soviet Union.* — In decisions both before and after the Second World War the Soviet Maritime Arbitration Commission recognized and gave effect to a choice-of-law clause²²⁸, and this practice was also followed by the Foreign Trade Arbitration Commission sitting in Moscow²²⁹. There were no statutory provisions dealing with party references²³⁰, but the Arbitration Commission has, for instance, applied the statute of limitation of a foreign law selected by the parties in spite of the fact that the Soviet rules on limitation were mandatory²³¹. However, the mandatory provisions against exemption clauses in bills of lading in the Soviet Russian Maritime Code of 1929, now no longer in force, were considered to be part of the Soviet Russian public policy which could not be evaded by the selection of foreign law²³². By thus giving effect to the *forum's* mandatory rules on the carrier's liability the Soviet Arbitration Commission did the same as did the courts in the States, parties to the Brussels Convention of 1924, which had enacted the Hague Rules of 1921.

The Soviet Russian Fundamentals of Civil Legislation of 8 December 1961²³³, Article 126, paragraph 2, have now provided for the free choice of law by the parties and the leading Soviet writers have since then supported party autonomy on grounds similar to those advocated by lawyers of other countries²³⁴. According to Lunz, employment contracts are not covered by the provision on party autonomy in Article 126²³⁵. Furthermore the Soviet Maritime Code of 7 September 1968 only allows the parties to a maritime contract to select a foreign law "in cases where the parties may derogate from the code". It is not clear whether this provision envisages party references to other laws or whether it only permits incorporations of such laws. Finally there are important exceptions from party autonomy both in maritime and other contracts in respect of formalities.

(2) *Other Socialist countries of Eastern Europe.* — The Czechoslovak Act of 4 December 1963 on private international law, section 9, expressly gives effect to choice-of-law clauses. The provision does not require local contact with the country of the intended legal system. Section 16 provides that the parties may also choose the law to be applied to an employment contract.

The East German Act of 5 December 1975 on the application

of law, section 12, also gives effect to a party reference and does not seem to require local contact with the country of the chosen law. However, section 12, paragraph 3, excludes freedom of choice for parties to a contract concerning transfer of interests in land situated in East Germany and section 27 does not permit party references in employment contracts.

The Polish Act of 12 November 1965 on Private International Law provides in Article 25, paragraph 1, that the parties may choose the applicable law provided that it has some relation with the contract. Relation is probably to be understood as local contact. Article 32 grants the same freedom of choice to parties to a contract of employment but Article 25, paragraph 2, excludes party references in contracts for the sale of immovables.

Provisions allowing party autonomy are also found in the legislations of Albania²³⁶, Hungary²³⁷ and Yugoslavia²³⁸, and though the other Socialist countries of Eastern Europe have no legal provisions in this matter, choice of law by the parties is upheld by the arbitration commissions of Romania and Bulgaria²³⁹.

(3) *The Comecon General Conditions.* – Important restrictions of party autonomy exist in trade between the Socialist countries. The General Conditions of Delivery of Goods were unanimously adopted by the Council for Economic Mutual Assistance (Comecon) and came into force in 1958. The present General Conditions date from 1979²⁴⁰. Similar General Conditions for the Erection and Supply of other Services in Connection with Delivery of Machinery and Plant were adopted in 1973 and came into force in 1974²⁴¹. According to the prevailing opinion among the authors of the Socialist countries the substantive provisions of these General Conditions which are adopted by all Comecon countries and which apply to all foreign trade contracts regarding sales and erection of plant and machinery are mandatory²⁴². The preamble to the General Conditions states that they can be departed from “if at the time of the conclusion of the contract the parties find that the specific nature of the goods or/and the specific character of their delivery warrant such departure”. Both sets of General Conditions leave the regulation of several issues to the parties and to the law. At this stage the conflicts provisions of the General Conditions come into play. The General Conditions for Delivery provide that the law of the seller, and the General Conditions for the Erection and Supply of Services

that the law of the contractor applies to all questions which are not fully regulated by the General Conditions. Soviet and Czechoslovak scholars hold that these conflict rules may be departed from when the specific nature of the contract warrants it²⁴³.

(viii) *Other countries, international conventions and international courts*

Limitations on party autonomy are to be found in the statutes of various Latin American countries, notably Chile and Mexico²⁴⁴. However, the parties' freedom of choice is recognized by most of the countries of the Spanish and Portuguese speaking world²⁴⁵, of Italy²⁴⁶, Greece²⁴⁷ and Turkey²⁴⁸. In Asia party autonomy is supported by the courts of India²⁴⁹ and Israel²⁵⁰ and by the legislatures of Japan²⁵¹, Thailand²⁵² and Taiwan²⁵³.

Those countries which have adhered to the European Convention on International Arbitration of 1961 have recognized that an arbitration tribunal must give effect to a choice of law by the parties. The Convention sets no limits. The parties are in principle free to choose any legal system they please²⁵⁴.

The 1965 Convention for the Settlement of Disputes Relating to Investment between States and Nationals of Other States, which in 1985 had been ratified by more than 80 countries, provides in Article 42 that the arbitral tribunal shall rule in accordance with the rules of law adopted by the parties.

In a decision rendered in 1929 by the Permanent Court of International Justice in the *Serbian and Brazilian Loans* cases party autonomy was recognized²⁵⁵. In several cases decided by international arbitral tribunals *ad hoc*²⁵⁶ and by the Court of Arbitration of the International Chamber of Commerce²⁵⁷ the right of the parties to select the law governing their contract has also been affirmed.

Article 3 of the Rome Convention of 19 June 1980 provides that a contract shall be governed by the law chosen by the parties. No contact or other kind of relationship between the chosen legal system and the contract, the parties or the contractual acts (for instance its making or performance) is required. However, the operation of the law chosen by the parties is limited in various respects. First, Article 3 (3) provides that the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only,

prejudice the application of mandatory rules of that law. In other words, a party reference to the law of a country unconnected with the contract is permissible only in international contracts. Second, as we shall see, Article 7 on the so-called directly applicable mandatory rules may limit the operation of the law chosen by the parties. Finally, in certain consumer contracts the consumer cannot be deprived of the protection offered to him by the mandatory rules of the country in which he has his habitual residence, and in individual employment contracts the employee is protected by the mandatory rules of the law which would govern in the absence of a choice of law by the parties, see Articles 5 and 6 of the Convention and *infra* at (c) (iii) (6). These limitations will be discussed below.

(c) *Comparison and critique*

(i) *Should party autonomy be permitted?*

As has been seen the parties' freedom to choose the law which governs their contract seems to be so widely accepted that it must be said to be a "general principle of law recognized by civilized nations"²⁵⁸.

In the present writer's view party autonomy is supported by two main considerations:

(1) *Certainty*. — The choice-of-law clause ensures certainty in commercial transactions. In the absence of such a clause the law of the contract will often be unknown to the parties until a court has spoken. In international contracts the *forum* is frequently unpredictable when the contract is being made, and even when the *forum* is predictable the law applicable very often cannot be foreseen having regard to the great uncertainty existing in so many countries as to the conflict rules respecting contracts. There is, however, one point upon which there is almost unanimous agreement between the laws of the various countries: the choice-of-law clause should be respected in principle. This uniformity ensures that a party reference will relieve the parties of their uncertainty as to the law governing their contract.

As Rabel says in his *Conflict of Laws* the choice of law by the parties "endeavours to obviate the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course"²⁵⁹.

(2) *Need for freedom.* — Another consideration is the need of the parties for freedom. In many international commercial contracts (sales, transport, agency, transport insurance, distributorship and licensing agreements, etc.) the parties have creditable motives for their choice. They may want to use a certain formula which is internationally known²⁶⁰. They may want to submit the contract to the law of the country that dominates the market²⁶¹. They may want to select a “neutral” law in which each of them has more confidence than in that of the domicile of the other party²⁶². A certain legal system may be well developed and well suited to the contract in question²⁶³. The parties may wish to refer to a law which they have used in earlier transactions with each other. The contract may have a close relationship to some other contract which is governed by a certain law²⁶⁴.

All these reasons may justify a choice-of-law clause, and even if they are not recognized in inland contracts they must be respected in international commercial contracts, where the parties are competitors not only with regard to the goods and services but also with regard to the legal system they may offer. The French Court of Cassation was the first to point to these considerations²⁶⁵ which have now been endorsed in the decree of 12 May 1981 amending the rules on arbitration of the French Code of Civil Procedure. A special part²⁶⁶ on international arbitration has been introduced giving the parties and the arbitrator an almost unrestricted freedom to select the law rules governing the substance of the dispute²⁶⁷. Article 1492 brings a definition of the international arbitration: an arbitration is international when it involves the interests of international trade. (*Est international l'arbitrage qui met en cause les intérêts commerce international.*)

Swiss, English and West German²⁶⁸ courts seem to have adopted the same attitude as the French.

(3) *Logical considerations.* — The exigencies of logic are fully satisfied by the argument of Haudek (p. 5) that the party reference acquires its legal sanction by the conflict rules of the *forum*. It cannot be argued that the *forum* may be unknown at the time of contracting so that the law of the *forum* cannot “act upon” the agreement of the parties. As shown by the Danish author Ross no rule of law operates with any certainty of application upon our acts when we do them²⁶⁹. In fact, no rule of law operates until a court

applies it in the course of a litigation. In every legal system there are gaps and overlaps which render uncertain the application of the existing rules to some factual situations. This is true not only of rules of law within a given legal system but also of the legal systems as such. Many international contracts contain such dispersed connecting elements that the probability of any one particular legal system being applied to them cannot be assessed with any degree of approximation. The probability depends upon the certainty with which the *forum* and the legal system applicable under the conflict rules of the *forum* may be predicted. The statement that a certain law governs the acts of the parties only means that it is probable that a court will apply that law. This also holds true of the rule of law governing the choice of law by the parties. The argument that a party reference has no effect because there is no law to give it effect at the time of contracting is unfounded. Such a pre-existing law is non-existent. The court will have to find the proper law and also the proper rule for determining the validity of the choice-of-law clause.

(ii) *The contract must be international*

It seems to be widely accepted in conventions, statutes, draft bills and cases that the freedom of the parties to make a party reference must be restricted to international and interstate contracts²⁷⁰.

However, what is to be understood by an international contract?

Where the parties have their place of business in different States, and goods, services and/or payment have to cross a frontier in order for the contract to be performed, there seems to be agreement. The contract is international. But when one of these two elements is absent, the answers differ.

According to Soviet theory a contract is international and the transaction is a foreign trade transaction when and only when one party is a foreigner²⁷¹. An earlier French theory which was applied in cases concerning the validity of gold clauses was that a "flow of values" across a frontier was necessary and sufficient to give a contract an international character²⁷². This definition was given up later on as being too narrow and rigid²⁷³. When the notion was introduced in the French Code of Civil Procedure it was provided that an arbitration is international when it involves the interests of international trade. Some of these interests are mentioned above under (i). However, they may also be invoked in contracts which have no

foreign elements but which are linked to other international contracts such as agreements which prepare export sales and domestic resales of imported goods. Here the question is whether the interests of international trade should be given priority over the national interests in having the mandatory rules of domestic law apply.

Attempts to define what is an international sale were given up when the Hague Convention on the Law Applicable to International Sales of Goods was negotiated in 1951. The Convention did not produce a positive definition of an international contract. Article 1, paragraph 3, states, however, negatively that the mere declaration of the parties relative to the application of a law or to the jurisdiction of a court or of an arbitrator does not turn a contract into an international contract²⁷⁴.

The Rome Convention 1980 and the Hague Sales Convention 1985 take a different approach. The Rome Convention is applicable to any situation "involving a choice between the laws of different countries". These situations are mostly international ones, but include cases where the parties submit a domestic contract to a foreign law. However, for such cases Article 3 (3) of the Rome Convention provides that the choice of a foreign law shall not prejudice the application of the mandatory provisions of the law of the country to which the contract is connected. This restriction on the parties' choice of law also applies when the choice of the foreign law is accompanied by the choice of a foreign tribunal.

The Hague Sales Convention 1985, Article 1 (*b*), lays down that it applies to contracts for the sale of goods in . . .

"cases involving a choice of law between the laws of different States, unless such a choice arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration".

Contrary to the 1955 Hague Sales Convention the 1985 Hague Convention gives up the requirement that the contract be international. According to the strict letter of the Convention any element other than the submission clauses mentioned in Article 1 (*b*), which may give rise to a choice of law would make applicable the rules of the Convention, and give the parties an unrestricted freedom to choose the law governing the contract, see Article 7. This would happen when, for instance, the parties have used a foreign standard form contract or when imported goods have been resold on the

same foreign conditions as those on which the seller bought them. One may question whether this was the intention of those who drafted the Convention. It is submitted that the parties should only be permitted to make a party reference if the contract has relevant connecting factors with more than one State. However, it is not possible to lay down which elements are relevant in all cases²⁷⁵. Each case must be decided upon its merits²⁷⁶.

When the interests of international commerce are at stake, the requirements for the existence of foreign elements should, it is submitted, be lenient. The French Court of Cassation has accepted a party reference to English law provided for in a standard form drawn up by the London Corn Trade Association which had been adopted by the parties. The contract was made between two French merchants and payment was stipulated to be made in France. The foreign elements were, as the court pointed out, that the corn purchased was Manitoba wheat to be shipped c.i.f. from an American port²⁷⁷.

However, in cases where the interests of international commerce are not at stake, the requirement of international contacts should be stricter. The problem is closely connected with the question of whether the parties should be allowed to choose the law of a country having no local contact with the contract.

The Rome Convention raises a further question, namely how to treat the emerging mandatory rules of the European Communities to contracts which only have contacts with the EC.

By and by the EC will get more and more of such rules. They may either be contained in a regulation which is directly applicable in the member States or, following a directive, be enacted in each of the States. Thus Article 12 of the Council Directive of 25 July 1985 on the approximation of the laws of the member States concerning liability for defective products²⁷⁸ provides that the liability of the producer arising from the Directive may not in relation to the injured person be limited or excluded by a provision limiting his liability or exempting him from liability. Mandatory provisions governing the contract with the self-employed commercial agent have been enacted in a Council Directive of 18 December 1986, see *OJ*, 1986, L 382/17. The question then arises whether in relation to such rules Article 3 (3) of the Rome Convention will consider the European Communities as one country. The answer is probably in the affirmative. An Italian seller and a German buyer of goods

will not be permitted to evade Article 12 of the Directive on products liability by submitting the sale to the law of a non-member State. In contracts connected with the EC countries only the parties' choice of law shall not prejudice the mandatory rules of EC law. These contracts are domestic seen from the point of view of the EC.

(iii) *Other conditions for allowing choice of law by the parties?*
Local contact or legitimate interest?

Much discussion has been devoted to the problem whether the parties should be permitted an unrestricted choice of law or whether the choice should be limited in some way, either by the specific requirement of a number of enumerated contacts or by a general clause demanding a reasonable contact with the chosen legal system. Another solution which is often mentioned is to require the choice to have been made *bona fide* or – reversing the burden of proof – to disregard the choice if it was made *mala fide* or in *fraudem legis*.

Legislation and case law all over the world reflect this discussion.

(1) *Local contact with the intended legal system?*

A. *Enumerated contact requirements.* – The earlier Polish Act of 2 August 1926 on Private International Law, Article 7, restricted the parties' freedom of choice to one of the following laws: the *lex patriae* or the *lex domicilii* of one of the parties, the *lex loci solutionis*, the *lex loci contractus*, and the *lex rei sitae*. These restrictions were abandoned by the new Act on Private International Law of 12 December 1965, and to my knowledge no other legislation has laid down similar requirements.

In favour of such requirements it could be argued that it makes it difficult for the parties to evade mandatory rules of law of countries connected with the contract by selecting a law which lacks any substantial connection with the agreement. The objection which seems to have led to their abolition in Poland is that they set an excessively narrow limit to the freedom of the parties. It is remarkable that in 1965 the government of Socialist Poland replaced the rule, enacted in 1926 by a bourgeois government, by a more liberal rule.

B. *Some local contact.* – A general clause demanding some contact with the intended legal system, but without specifying its precise nature, is found in the New Polish Act of 12 December

1965, Article 25, paragraph 1. The chosen law must have some relationship with the contract. Whether this relationship must consist of a local contact of some kind as that envisaged by the Act of 1926, but not restricted by a *numerus clausus*, is not known for certain, but it is likely. The same idea appears in some American²⁷⁹ and in earlier West German²⁸⁰ cases.

This rule also seeks to prevent evasion by relying on objective criteria. The "reasonable relationship" must be tangible or visible.

The disadvantage of the rule is that it prevents the parties from making a *bona fide* choice of a law unconnected with their agreement. As has been pointed out *supra*, (i) (2), such *bona fide* choices occur. Furthermore the rule does not prevent the choice of law made *in fraudem legis*. In a variety of circumstances it will be easy for parties who want to evade a law to create some contact with the chosen law.

(2) *The legitimate interest of the parties. Evasion*

(a) *Extension of the bona fide rule.* — Lord Wright is taken to have stated English law when in the *Vita Food* case²⁸¹ he said that the intention of the parties to choose the law applicable must be "*bona fide* and legal". Connection with the law chosen was not "as a matter of principle necessary". In other words, a choice of law should be set aside only if it was made with an evasive intent. This was probably also the position taken by the French Court of Cassation which in 1930 and 1931 pointed out that the reason underlying party autonomy is the regard for the interests of international trade and which has accepted a party reference to the law of a country having no significant contact with the contract²⁸². The decisions and *dicta* of West German cases since 1961 indicated a tendency to adhere to the same policy²⁸³.

In the *Adès* case decided in 1965 the Swiss Federal Tribunal stated that the existence of substantial, and especially local, elements connecting the relationship with the chosen law should not be made an absolute requirement²⁸⁴. The choice should be accepted if the parties have reasonable interests in making their particular choice of law. Such a reasonable interest exists when the chosen legal system is particularly suitable for the contract in question, when the parties want to submit themselves to well-tried trade customs of the chosen law, when the contract is connected with other contracts which are governed by the chosen law, or when in

their pleadings the parties choose to rely on the law of the *forum*. In a leading case decided in 1960 the Italian Court of Cassation held that local contact with the chosen legal system was not necessary. The party reference was sufficient to make the chosen law applicable. In the opinion of the court it would be illogical to assume that the parties have no reasonable ground for their choice of law²⁸⁵.

Several American decisions express the same idea by stating – mostly *obiter* – that a choice would not be upheld if it were made in order to “avoid applicable law”²⁸⁶. The Restatement 2d (1971) provides that “a choice of law will not be upheld if there is no . . . reasonable basis for the parties’ choice” (paragraph 187 (2) (a)).

It is accepted by writers in some Socialist countries that a choice-of-law clause should be upheld, even if no factors connect the contract with the chosen legal system, and that the choice should be disregarded only if it has no reasonable basis. Both Lunz²⁸⁷ and Ramsaizew²⁸⁸ state that under Soviet Russian law the parties have an unrestricted freedom of choice, and the Czechoslovak, Hungarian and Yugoslav acts on private international law do not require any contracts. Lunz mentions the possibility of selecting the law of a third country unconnected with the contract in cases where the parties desire to submit their agreement to a “neutral” foreign law²⁸⁹. Attempts to evade mandatory rules of Soviet Russian, as well as of foreign law, whether Socialist or non-Socialist, in violation of the principles of normal international commercial practices, will be met by the public policy clause of Soviet Russian law. This point of view, though not confirmed by any known decision of a Socialist arbitration commission, seems to be in harmony with the techniques of Socialist foreign trade.

In the Hague Convention of 1955 on the Law Applicable to International Sales of Goods, Article 2 allows party autonomy; no contacts are required, but the court may disregard a foreign rule of law that is incompatible with the public policy of the country of the *forum*. In his commentary on the draft of 1951 Julliot de la Morandière asserts that this public policy provision of the convention may be used to disregard a fictitious choice of law made by the parties in order to evade the law which is otherwise applicable²⁹⁰. In most legal systems, however, the safety valve of *ordre public* has been used to discard foreign substantive rules of law because of their contents and – hitherto – not to disregard a choice of law made *in fraudem legis*²⁹¹.

(b) *The Rome Convention*. — It is disputed whether the Rome Convention gives any support to the idea that a choice of law by the parties is to be disregarded if it is made with an intent to avoid the application of a law which would otherwise govern the contract. The Convention and the *Official Report* seem to avoid the issue. One can see, however, that the problem was in the minds of the draftsmen. Article 3 (3) was made to disregard those choices which were made to avoid the application of mandatory rules of a law governing a contract which has no significant foreign elements²⁹². In the Comment to Article 3 (1) the *Official Report* mentions the possibility of the parties using their freedom to choose a law governing part of the contract only and thereby avoiding mandatory provisions. Such an attempt, the Report says²⁹³, could be eliminated by Article 7 on the application of certain mandatory rules of a law other than the one governing the contract. Finally, Articles 5 and 6 prevent attempts by the parties to contract out of the mandatory rules of the law applicable to certain consumer and individual employment contracts by selecting another law.

In France and Belgium there is a general principle of law by which “fraud makes an exception to all rules”²⁹⁴. French and Belgian writers maintain that the principle also applies to the Convention²⁹⁵; it should, however, be used with caution since the Convention gives the parties the freedom to choose the law of a country unconnected with the contract.

An argument against including the *fraus legis* principle in the Convention is that the draftsmen considered doing so, but did not do it. The rules they made to avoid the fraudulent choice of law use objective criteria, see Articles 3 (3), 5, 6 and 7. Both the text of Article 16 and the *Official Report* exclude the application of the *ordre public* to cases of *fraus legis*²⁹⁶.

On the other hand, the draftsmen did not take a firm attitude to the issue. Furthermore, the Convention does not exclude evasions. The public policy provision cannot be invoked against them. Article 3 (3) only enforces the mandatory provisions of the law of a country to which the contract has all its relevant connecting factors. Articles 5 and 6 prevent the parties from avoiding the mandatory provisions of the otherwise applicable law in certain consumer contracts and in employment contracts, but not in other weak party agreements. Article 7 (1) provides an uncertain basis for en-

forcing mandatory rules of the otherwise applicable law, and may be excluded by the member States, see Article 22 (a).

It will be pointed out below that the Rome Convention does not provide adequate protection to some of those groups of weak parties which need it. In order to help these groups a frequent application on the *fraus legis* rule could be useful. However, as the Convention is written and intended the *fraus legis* rule can only be used with caution. It must be shown that the choice of law by the parties would violate a strong public policy of the otherwise applicable law, and that the choice is not supported by the interests of international trade.

This rule, it is submitted, deserves general support, and should be applied to those contracts where the parties have freedom to choose the applicable law, see *infra*, (5).

The mere intention of avoiding mandatory provisions should not be sufficient to disregard a choice of law clause²⁹⁷. Thus a court should not prevent the parties from eliminating common law rules on consideration by choosing a law unconnected with the contract which does not have such rules. On the other hand, parties from two countries which have the same or very similar mandatory provisions protecting the commercial agent should not be permitted to avoid these rules by selecting the more permissive law of a third country unconnected with their agreement.

(3) Critique of the unfettered freedom.

If we disregard the question of evasion we must realize that a liberal rule accepting the choice of any legal system has made a triumphal progress. Experience seems to show that in commercial contracts made between parties of equal bargaining power this rule is to be preferred in most cases.

In other contracts the rule does not account for the fact that a choice of law, though made without any evasive intent, may clash with mandatory rules of law expressing a fundamental policy of a system of laws closely connected with the contract. The reasons supporting party autonomy are not always strong enough to outweigh such fundamental policies. Furthermore the unrestricted freedom of the parties to select the applicable law may be a dangerous tool in the hands of a powerful enterprise dealing with a weak party. In many legal systems the parties' freedom of contract is restricted by various kinds of mandatory rules.

A. *The economic legislation.* — In the first place their freedom is restricted by the economic legislation such as the laws against restrictive trade practices, price legislation and exchange control legislation and other measures which regulate the economy of the State. The impact of these rules on the conflict of laws is discussed later in this chapter, see 4.

B. *Inequality of bargaining power.* — The mandatory rules to be treated here and in the following sections ((5) and (6)) are those which may be called protective laws the purpose of which is to balance the inequality of the bargaining power of the parties in the present economy.

The typical international contract is a commercial contract made between business enterprises. In this contract there is typically no inequality of bargaining power. However, some international contracts are consumer contracts. One party to them is an enterprise providing goods or services and the other person is buying for private use or consumption. Others are non-professional contracts in the sense that the other person dealing with the enterprise lacks professional knowledge. An example is the dentist who buys a computer for his clinic. In these cases the enterprise usually enjoys a stronger economic position than the consumer and the non-professional; it has more skill at its command and a greater interest in framing the conditions of the contract. Employment contracts belong to the same category, and so do contracts entered into with small farmers, fishermen and artisans who buy or sell in the course of their business. In these cases, too, the weaker party, the employee or the small producer lacks the skill and the economic strength of the other party.

The idea that “men of full age and competent understanding shall have the utmost liberty of contracting”²⁹⁸ is losing ground. It is being realized that for the weak party to a consumer contract there is no real liberty. This is clearly shown by adhesion contracts which in all Western countries contain clauses imposing onerous conditions upon the consumer, the employee and the “weak” producer²⁹⁹.

C. *Instances of legislative measures.* — To remedy the abuses resulting from the inequality of bargaining power and from social inequalities various measures have been adopted to protect the weaker party.

In a number of countries contracts of the type which involve parties in a weaker economic or social position have been regulated by protective and mandatory legislation. Special provisions control the terms of hire purchase and conditional sales contracts, leases, small loans, life and accident insurance, employment contracts, etc. The rules apply both to adhesion contracts and to contracts of an individual character.

Though most of the contracts mentioned are consumer contracts and other contracts involving a weak party, the protection is sometimes also extended to an equal party to a commercial contract of any of these types. An enterprise taking premises on a lease or insuring premises and equipment against fire is usually protected by the mandatory rules on leases and fire insurance. In some countries most of these contracts, as well as some kinds of liability insurance contracts, must meet several mandatory requirements not only to protect the customer but also to safeguard the interests of third parties (the mortgagee of the insured premises, the victim who may benefit from the liability insurance) and of the community as such.

During the last decades several countries have enacted statutes against unfair contract terms. Some are general rules rendering unfair contract terms unenforceable³⁰⁰ and some contain specific rules striking at certain types of unfair terms such as exemption-of-liability clauses³⁰¹. Some of these statutes apply only to adhesion contracts³⁰² and/or only to consumer contracts³⁰³. Others which protect all parties give the weak party extended protection if he is a consumer or if the contract is an adhesion contract³⁰⁴. The category of persons protected as consumers are not the same in all the laws. Some only cover the persons who buy goods or services for private and household consumption: others also protect persons who buy for a professional use but who act as non-professionals in relation to the contract³⁰⁵.

(4) Freedom of choice subject to the observation of certain mandatory rules

A. Public policy and "directly applicable" statutes of the forum. — All countries require obedience to the fundamental public policy (*ordre public*) of the *forum*. In several Continental countries the public policy has a dual aspect. Negatively, foreign law

repugnant to the ethical or political bases of the law of the *forum* country is to be denied application³⁰⁶. Positively, a statute of the *forum* which by virtue of its own terms or of statutory interpretation regulates the subject-matter must be applied irrespective of whether foreign law is otherwise applicable³⁰⁷. In common law countries the latter aspect of public policy is not usually expressed in terms of that doctrine³⁰⁸.

Both functions of public policy have been relied upon to safeguard application of the protective legislation of the country of the *forum*, especially when the contract is sufficiently connected with that country. The doctrine of public policy does not, however, render the protective legislation of foreign countries applicable. Public policy is a national remedy and that is one of its weaknesses. Further, the more frequently the doctrine is applied by the courts, the more frequently will the national issue arise independently of the foreign law of the contract. A frequent application of local public policy will encourage *forum* shopping and endanger predictability and uniformity of decision. It is therefore suggested with good reason that the principle of public policy should be applied cautiously. A more tolerant approach to foreign law and narrower interpretation of the domestic law alleged to be "directly applicable" should be adopted by the courts³⁰⁹, see *infra*, 4 (c) (i).

B. Observance of the law of the place of performance. — The English courts have made attempts to cope with the problem. Collins believes that he states the law of England when he contends that the contract is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed³¹⁰. The cases which support this rule deal with the effect of maximum prices, revenue laws, trade laws and other economic laws. The underlying idea is that English courts will not sanction a violation of the laws of another country. It is, however, doubtful whether the rule is an adequate expression of this idea. It may cover cases where the place of performance is of no real importance as a connecting factor. Moreover, illegality or prohibition of performance does not necessarily abrogate the contractual obligation. A court will in general not order an obligor to perform specifically in a foreign country the law of which prohibits performance. However, the question whether the debtor is released from the contract or he is liable in damages for non-performance is one

concerning the contractual obligation to be governed by the proper law of the contract.

C. *Fundamental policy of the otherwise applicable law.* — Some draft laws contain proposals that courts should abide by certain mandatory provisions of the law which would have been the governing law in the absence of an effective choice of law by the parties. Although the law which would be applicable if the parties had not made a choice is not to be treated as the proper law of the contract, those of its rules expressing some fundamental policies of that legal system should be observed.

The American Restatement 2d (1971), paragraph 187 (2), gives preference to rules expressing the fundamental policy of a state which has a materially greater interest than the chosen law in the determination of the particular issue and which would have been the state of the otherwise governing law. Fundamental policy is described in the comment as something less vital than public policy but more vital than the considerations which make a rule mandatory only. Rules aimed at protecting the weaker party should, for example, be treated as expressing fundamental policy (see *supra*, (v) (iii) (5)).

D. *Fundamental policy of another foreign law.* — Under Article 7 (1) of the Rome Convention 1980 effect may be given to the mandatory rules of a law which is not the proper law of the contract if the situation has a close connection with the enacting country and if and so far as under the law of the latter country those rules must be applied whatever the law applicable to the contract. See on these rules *infra* at 4.

E. *Critique.* — The notion that the social policies underlying a rule of law determine its sphere of application can be traced back to the statisticians in the middle ages. In recent years it has been revived by Cavers, Currie and other American authors³¹¹.

The American authors are quoted by French, Belgian and Dutch writers who claim that there exist rules of domestic law which apply of their own motion. They define their own spatial application either, as do the Hague Rules on Bills of Lading, by providing so expressly, or they are deemed to define it in accordance with established principles of statutory interpretation. Their application is not determined by the rules of the conflict of laws and they are therefore "directly applicable"³¹².

In the Dutch *Alnati* case mentioned above the Hoge Raad *obiter* referred to the existence of such important interests of a foreign State in having a provision of its laws apply so as to compel Dutch courts to take the provision into consideration³¹³. American courts have pronounced *dicta* to the same effect, but it would seem that few occurred in connection with a party reference³¹⁴. In the *Alnati* case, however, the Belgian Statute incorporating the Hague Rules on Bills of Lading was not applied. Dutch law which had been chosen by the parties was applied, although the contract was more closely connected with Belgium. The Belgian rules were obviously not considered to be so vital by the Dutch Hoge Raad as to deserve application. Although they were "directly applicable" they were obviously not found to be sufficiently "fundamental".

According to Restatement 2d (1971), section 6 (2) (c), a rule of foreign law forming part of a legal system which is neither the law chosen by the parties nor the law which would be applicable otherwise may "demand" application and may be applied by the *forum* because of a relevant and strong public policy of that state.

This idea has also been adopted in Article 7 (1) of the Rome Convention 1980 quoted above.

The provisions of the Restatement and the Rome Convention make it possible for the courts to take into account rules which express a fundamental policy of the law of a country closely connected with the issue or the situation. The authors of these provisions realized that there are cases where the parties' freedom to by-pass mandatory provisions should be limited.

In most of the reported cases in which a choice of law was disregarded in favour of some foreign system of law, the latter was also the proper law of the contract objectively determined³¹⁵. Some of these cases were affected by the need to protect the weaker party to a consumer or an employment contract³¹⁶. This need is also expressed in the Rome Convention 1980 which in Articles 5 and 6 provides that a choice of law by the parties shall not have the result of depriving the consumer and the employee of the protection afforded to him by the mandatory rules of the law which would otherwise be applied to the contract under the Convention.

However, neither section 6 (2) (c) of the Restatement 2d and Article 7 (1) of the Rome Convention nor Articles 5 and 6 of the Rome Convention provide the weaker party with adequate protection under the law that would otherwise govern the contract. The

governmental interests of the state most closely connected with the contract are seldom safeguarded by its mandatory rules only. These interests call for the contract as such to be governed by the law of that state. The endeavours of a state to counteract social inequalities cannot be satisfied by a piecemeal application of its most "urgent" rules.

Furthermore, it will often be difficult for a court in one country to determine which rules of foreign law express the fundamental policy of the foreign country concerned. The law chosen by the parties will in general be the one suggested or dictated by the stronger party. It will often be foreign to the weak party who is left with the additional task of ascertaining which rules under the otherwise applicable law are mandatory and which are not. The objections raised above (1 (a) (vii)) against the *dépeçage* of a contract hold true also of the isolated application of mandatory rules or rules expressing a fundamental policy.

The weak party would be more safely protected if the otherwise applicable law governed the entire contract. This seems to be the solution of the Swiss draft Private International Law 1982 which without qualification excludes the parties' choice of law in consumer contracts and which, also without qualification, restricts the parties' choice of law in employment contracts³¹⁷. It is the solution of the Restatement 2d (1971) as far as life insurance and fire, accident and surety insurance contracts are concerned (sections 192, 193). Here the contract is governed by the law with which it has the closest local connection and which gives the insured party the best protection. Choice of law by the parties is allowed only in certain situations.

On the other hand, in commercial contracts of international trade the need to allow the parties freedom to negotiate will often outweigh foreign fundamental policies. The Dutch decision of 1966 mentioned above provides an instance. Rules expressing fundamental policies are often more sensitive to non-commercial than to commercial contracts.

(5) The need to differentiate between various kinds of contracts

A. *The policies involved.* — On the one hand strong reasons call for party autonomy. The parties will often need to know beforehand what law applies and what are its effects, and merchants

need the freedom of action which party autonomy allows them. On the other hand equally cogent arguments may be put forward against the freedom of the parties to choose the applicable law. A weak party faced with the alternative of adhering to the terms set by the other party or of not contracting at all may find such a freedom fictitious. Furthermore, some contracts are matters of intense public concern. The major purpose of the legislation affecting them is to protect the weak party against unconscionable or restrictive terms.

B. The various types of contracts. — The substantive law of contracts presents a varied picture. As mentioned in (3) above, the *dirigisme* of the welfare State has had a considerable impact on the law of several types of contracts, especially those of a non-commercial character. For so far as the latter are concerned the freedom of contracting has been considerably curtailed, whereas the parties still enjoy more or less complete freedom in concluding commercial sales, transport insurance, agency, loan or licence contracts.

In determining their centre of gravity, some types of contracts are normally located without difficulty; others often contain dispersed elements and are difficult to attach to any country solely on the strength of their local connection. A lease of an immovable, an employment contract, are examples of the former type; a sale made by correspondence between merchants residing in different countries exemplifies the latter.

In the absence of a choice of law by the parties the typically dispersed contracts must be localized by a conflict-of-law rule, for instance a rule relying on the place of business or the place of performance of one of the parties. However, the rules differ from country to country and therefore also from *forum to forum* which makes a safe localization of these contracts difficult.

C. The relationship between the policies and the categories of contracts. — The freedom of the parties to choose the applicable law will, as mentioned above, depend upon a weighing of interests: on the one hand, the interests of the community with which the transaction has a substantial local contact demand the application of its protective mandatory rules. This interest is the stronger and the worthier of consideration the more the contract in question would be regulated by mandatory requirements of a particular

country, if it were governed by the law of that country and the more closely it is connected with that country. The community's interests are generally more concerned with consumer and similar weak party contracts than with commercial contracts. On the other hand, the interests of international trade call for a certain freedom. This, as mentioned above, applies especially to commercial contracts. Some of these contracts cannot be easily localized in a particular country and here the determination of the proper law by the parties ensures predictability. The compulsory application of the mandatory rules of another legal system to international contracts may hamper the exchange of goods and services. These interests of international trade should also be recognized by the conflict rules of the State whose mandatory rules will be disregarded, if a party reference to another legal system is accepted. They should be recognized also when, according to the conflict rules of the *forum*, another legal system would have applied as the proper law in place of that chosen by the parties. The mandatory rules of the law chosen by the parties apply in any event.

It will be seen that the less a contract is restricted by mandatory requirements and the more subject it is to uncertainty when it comes to determine its proper law, the freer the parties must be to determine themselves the proper law of that contract. The need for such freedom is greater where commercial and less where consumer or employment contracts are involved.

It is not surprising that party autonomy in substantive law and in the conflict of laws should be connected. The former was one of the main reasons for the rise and development of the latter; party autonomy in the conflict of laws did not spread to areas where little or no freedom of choice existed in substantive law³¹⁸.

It is submitted, then, that extensive freedom of choice should be restricted to commercial contracts. Commercial sales, leasing, agency and distribution agreements, transport insurance³¹⁹, reinsurance and licensing contracts are examples of such commercial contracts. In these "free" and commercial contracts the parties should be allowed to select a system of laws which lacks any contacts with the contract. The reported cases have shown very few abuses of this freedom.

It is submitted, therefore, that in the sphere of free and commercial contracts a party reference should be upheld. Only certain

mandatory economic laws of a closely connected system might act upon the contract, see *infra* under 4.

On the other hand, it is undesirable that the same amount of freedom which is allowed to the parties in business contracts should be conceded for weak party contracts such as employment contracts, life insurance, small loans, hire purchase, conditional sales and other consumer sales. In employment contracts the law of the place of work will be applicable in most cases. In life insurance contracts the law of the domicile of the insured party will be applied. The law of the place where the goods are to be used by the consumer, the small farmer, fisherman or artisan should generally govern sales to such parties including hire purchase and conditional sales.

Contracts which must comply with several mandatory requirements not only for the benefit of the customer, but also of third parties should, in general, be ranked with consumer contracts and unequal contracts. Thus for leases of immovables the law of the *situs*, for contracts of fire or liability insurance, the law of the country where the risk is located will apply even if the lessee or the insured party is a commercial enterprise.

The parties should not be precluded, however, from selecting another system of laws provided that the chosen law has a considerable local contact with the contract. Thus, a choice of law should, in general, be allowed when the customer has sought out the enterprise in its home country in order to buy the movable in question, to take out his life insurance, to participate in a conducted tour, etc. On the other hand, in consumer and other weak party contracts choice of law clauses introducing a system of laws other than that which would be applicable according to the criteria set out above, should not, in general, be upheld when the enterprise has sought out the weak party in his country, for instance when it has established an agency or an office there in order to do business with customers in that country.

If party autonomy is thus restricted in respect of consumer contracts, contracts of employment and other contracts, where bargaining power is often unequal, and contracts where the interests of third parties or of the community as a whole are involved, it is unnecessary to restrict the scope of the proper law as narrowly as some courts and writers have thought proper. As will be shown below (4 (c) (ii)), more rules of a public law character may come

within the scope of the proper law of the contract, if that law is chosen on considerations of social policy than if the intention of the parties is made to govern³²⁰.

It is believed that a distinction between free and controlled contracts and between commercial and non-commercial contracts will be found to exist in most countries, although, of course, variations will occur from place to place and from time to time³²¹.

(6) The Rome Convention

The Rome Convention on the Law Applicable to Contractual Obligations 1980, Articles 5 and 6, is in some respects in accordance with these propositions. Article 5 provides that in contracts for the supply of goods and services a consumer is protected by the mandatory rules of the country in which he has his habitual residence, provided that he has been sought out in that country by the supplier with whom he is dealing. Article 5 (2) describes how the consumer must have been addressed and have acted in order for the protective rules to apply³²². Article 6 lays down that an employee who is a party to an individual employment contract is protected by the mandatory rules of the law which would normally govern the contract in the absence of a choice of law by the parties. According to Article 6 (2) this is the law of the country in which the employee habitually carries out his work or, if the employee does not habitually carry out his work in any one country, the law of the country in which the place of business through which he was engaged is situated. If, however, it appears from the circumstances that the contract is more closely connected with the law of another country the contract shall be governed by the law of that country.

It is submitted that the protection offered by the Rome Convention is inadequate:

A. Articles 5 and 6 only give the weak party the protection afforded by the mandatory rules of the otherwise applicable law, see *supra* (4).

B. They apply only to certain consumers and to employees but not to other groups of weak parties, see *supra* (5). The non-professional party and the small farmer, fisherman, shopkeeper, artisan, etc., is not protected by the law of his place of business. Against an extension of the rule in Article 5 to these persons it is

argued that within the trades and professions it is almost impossible to distinguish groups of weak parties from those who can fend for themselves. Besides, Article 7 of the Convention may be applied to give effect to laws protecting these groups. However, the difficulties of drawing a distinction between weak and strong parties is not a consideration weighty enough to leave these groups without adequate protection. As will be mentioned *infra* under 4 (c) (ii), Article 7 does not provide a sufficiently safe basis for protecting the weak parties mentioned above.

C. It permits the parties to choose the law governing contracts which in most legal systems must comply with several mandatory requirements such as leases of immovables and those life and casualty insurance contracts which are covered by the Convention.

(iv) *Multiple choice of law for a single contract*

It may happen that parties select more than one law to govern their contract. It has occurred that parties have agreed that the contract is to be governed by the law of A and that the law of B is to apply to special questions under the contract.

The agreement on the applicability of the law of A is then, in general, to be understood as a party reference and the selection of the law of B as an incorporation³²³. If, however, the parties have made a party reference to more than one law, the validity of such an agreement should depend upon the type of contract to which it applies and upon the interest underlying such a choice. Parties who include several types of contract — for instance a sole distributorship and a licensing agreement — in the same formal contract may have a legitimate interest in submitting the various component parts to different laws. They may also agree that a contract which is to be executed in several countries shall, as regards performance, be governed respectively by the law of that country where the particular act of performance is to take place. Such a multiple choice of law covers those aspects of a contract which can be severed from the general contractual relationship of the parties and concern specifically the performance of the contract in each individual country.

It is for such contracts that the Rome Convention allows the parties to select the law applicable to a part of the contract, see Article 3 (1). Under this rule the parties may choose a law for a part of the contract and leave the other parts to be governed by the

rules on the law applicable in the absence of a choice. The parties may also select two or more laws to govern severable parts of the contract³²⁴.

Party references to several laws have been attempted with an evasive intent and have been disregarded³²⁵. It has also happened that the parties have chosen a law which invalidated the contract or parts of it. Relying on the presumed intention of the parties (who must have intended to conclude a contract which is valid according to the law chosen by them) it has been suggested that in these circumstances the validity of the contract as a whole or of those parts of it which are invalid should be governed by another law which would uphold the contract³²⁶. This solution has not been accepted by the courts in Scandinavia³²⁷, the United States of America³²⁸, West Germany³²⁹ and England³³⁰ and, it is submitted, rightfully so. If the parties have agreed upon the application of a system of laws that renders the contract, or parts of it, invalid, the contract or the invalid parts cannot be enforced. Certainty in commerce is better served if the courts follow the agreement and apply the law invalidating the contract than if they try to ascertain what would have been the parties' inmost thoughts and wishes, had they known that the chosen law would render the contract invalid. Under the Rome Convention which has banished the presumed intention of the parties in Article 3 (1) such a solution would not be permitted, see *infra* (d).

(v) *The law governing a clause incorporating foreign law*

A. *The validity of a clause incorporating foreign law.* — As mentioned in 2 (a) above the parties may freely shape their contract within the limits set by the rules of the proper law. This they may do either by defining the desired conditions in express terms or by referring to those provisions of a foreign legal system which they seek to apply (incorporation)³³¹.

The validity of this incorporation of foreign law is determined by the proper law of the contract and not by the law of the *forum* or by any other law. It is, for instance, for the proper law to decide whether an incorporation clause in a standard form contract is an onerous term which should be disregarded in order to protect the weaker party, or whether — in view of the commercial character of the contract — it should be upheld.

A. Invalid party reference as incorporation of foreign law. — When the choice of law is disregarded the proper law of the contract is the law which governs in the absence of an effective choice of law by the parties.

Some authors maintain that a choice-of-law clause which is ineffective as such may still be regarded as a clause incorporating foreign law³³². According to this view the law which would govern in the absence of an effective choice of law by the parties is regarded as the proper law of the contract; within the framework of the proper law the parties' right to shape their contract should be upheld. In practice this would mean that only the mandatory provisions of the proper law should be followed. Within the large area of the *jus dispositivum* of the proper law the rules of the law chosen by the parties would apply.

It seems more appropriate, however, to leave to the proper law objectively ascertained the determination of the question as to how an ineffective choice is to be treated. The proper law must thus decide whether the choice of law should be disregarded altogether so that the proper law will govern not only the validity but also the interpretation and construction of the contract, or whether the party reference should be upheld as an incorporation clause.

(d) *Tacit choice of law*

The Problem. — Most systems of private international law admit that a choice of law can be exercised not only expressly, but also tacitly. Here the question is: which facts are, in general, taken as proof of a tacit choice? Is, for instance, submission by the parties to the court of a particular country or to an arbitration tribunal in a particular country relevant and sufficient evidence? And what is the importance of the language or of the technical legal expressions in which the contract is couched, or of a reference to legal provisions of a certain country?

(i) *Effect of submission or arbitration clauses*

(1) *The Practice of Western countries*

A. The Conventions. — The Hague Convention on the Law Applicable to International Sales of Goods of 1955, Article 2, paragraph 2, provides that the choice of law in order to be effective

must be contained in an express clause or unambiguously result from the provisions of the contract. The draftsmen of the convention wanted to give the other provisions of the convention, especially those on the application of the law of the seller, a reasonable chance of coming into their own. Conscious of the case law in some countries which had relied on the presumed intention of the parties in order to justify the application of any law, which it was found expedient to apply in the circumstances, the draftsmen wished to oust the influence of the presumed intention of the parties. In their opinion this could only be achieved if the operation of party autonomy was restricted to those cases in which the choice of law was beyond doubt³³³. For the purpose of Article 2, paragraph 2, a clause submitting to the jurisdiction of the courts of a particular country is probably only an element supporting the existence of an unambiguous choice of law. Other elements such as the use of legal terms, or a reference to provisions of the law of the country where any litigation or arbitration is to take place must be present in addition.

The Rome Convention 1980 has taken a more flexible attitude. Article 3 (1) provides that the parties' choice must be express or be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.

On the one hand the Rome Convention will not permit the court to infer a choice of law that the parties might have made if they had considered the matter. When it does not appear from the facts that the parties had a clear intention to submit the contract to the law of a certain country the rules in Articles 4 et seq. on the applicable law in the absence of a choice apply.

On the other hand the court may find that the parties made a choice of law although the choice was not contained in an express clause or resulted unambiguously from the provisions of the contract. A tacit choice may be found in a standard form contract which is known to be governed by a particular system of law although it does not contain an express statement to this effect such as the Lloyd's policy of marine insurance, which is governed by English law. The parties' choice of a forum — including a national arbitration tribunal — may also show that the parties wanted the contract to be governed by the law of the *forum*, but this must be compatible with other terms of the contract and the circumstances of the case³³⁴.

B. *Italy*. — The Italian Supreme Court has held that an agreement to submit to arbitration in a foreign country was not by itself an indication that the parties wanted the law of that foreign country to apply³³⁵. A lower court, however, had held that a clause in an agreement to charter an Italian ship referring disputes to the Paris chamber of arbitration featuring in a French standard form contract which also required payment in French currency amounted to a tacit choice of French law³³⁶.

C. *England*. — English courts have held that an agreement to submit to the jurisdiction of the courts or to arbitration in a particular country is evidence of an intention to apply the law of that country. In most cases this led to the application of English law³³⁷. In two leading cases dating from the end of the nineteenth and the beginning of this century submission to arbitration in England led the English court to uphold an arbitration clause which was valid by English law, and which would have been invalid according to Scots and Jersey law respectively, which would have applied in the absence of an effective choice of law³³⁸. However, in 1970 the House of Lords held that a contract made in France between a French shipowner and a Tunisian charterer for the transport of oil from one Tunisian port to another, payment to be made in France, was governed by French law although the charterparty provided for arbitration in London. The charterparty also contained a clause that it was governed by the law of the flag. However, since the ships used for the transport of the 350,000 tons of oil were Norwegian, Swedish, French, Liberian and Bulgarian and all were chartered by the "shipowner", the clause was held incapable of application. Apart from the arbitration clause the contract had no other connection with England. Their Lordships agreed that even if the parties had failed to make an express choice of law the proper law of the contract was French law with which the contract had its closest connection. They also agreed that where the parties had made no express choice of law, the inclusion of an arbitration agreement is very strong evidence of an intention to apply the law of the place of arbitration, but that such an agreement "... should not be treated as giving rise to a conclusive or irresistible inference..."³³⁹.

D. *France*. — The French courts have also been induced by an arbitration or jurisdiction clause to conclude that the parties intended to submit the contract to the law of the chosen *forum*³⁴⁰.

In one of the leading cases the court was faced with the problem whether the submission to arbitration and to the courts in England constituted a valid choice of English law with the result that the arbitration was valid while it was invalid according to French law which would have applied in the absence of a valid choice of law. The court held that the submission constituted a tacit and valid choice of English law and upheld the arbitration clause³⁴¹.

E. *West Germany and Switzerland*. — In West Germany the courts have held over a long period of time that a clause submitting to the courts or to arbitration in a particular country constituted a tacit choice of law of that country³⁴². Sometimes other connecting elements or other indications of intention were taken into account as additional evidence of a choice of law. The Rome Convention now enacted in West Germany will probably not change this practice.

In several decisions the Swiss Federal Tribunal concluded that a clause submitting to the jurisdiction of the courts of a particular country was to be regarded as a tacit choice of the law of that country³⁴³.

F. *Scandinavia*. — Scandinavian practice is mainly in accordance with that in Germany³⁴⁴. Both arbitration and jurisdiction clauses are usually regarded as indicating a tacit choice of law. As in West Germany and Switzerland, other elements are often invoked together with the submission clause as proof of the intention.

G. *The United States*. — The former hostility towards clauses submitting to courts or arbitral tribunals should have made American courts reluctant to view such clauses as evidence of an intention of the parties to apply the law of the chosen jurisdiction.

Some authors, however, have spoken in favour of viewing an arbitration clause as persuasive evidence of an intent to apply the law of the place of arbitration if that place has been designated by the parties in the contract. In a decision of 1962 the Appellate Division of the Supreme Court of New York held that the application of the law of New York to the contract in question was "supported by the fact that the arbitration clause provided for arbitration in the City of New York"³⁴⁵. The Restatement 2d (1971), paragraph 218, provides, *inter alia*, that the duties and rights created by an arbitration agreement are determined by the rules of paragraphs 187 and 188 which are the general rules on contracts. In the comment it is said that a provision by the parties in a contract that arbitration

shall take place in a certain state may provide some evidence of an intention on their part that the law of this state should govern the contract³⁴⁶. The provision, it is said, shows that the parties have had this particular state in mind and that they must presumably have recognized that arbitrators sitting in the state would have a natural tendency to apply its local law. Dictates of convenience also support the application of this law, seeing that the arbitrators are likely to be most familiar with it.

The present writer has not been able to find any American authority on the question whether a *jurisdiction* clause has been viewed as evidence of the parties' intention to apply the law of the chosen *forum*³⁴⁷.

(2) *Socialist countries*³⁴⁸

In the Socialist countries cases concerning foreign trade are mostly brought before the arbitration commissions of the chambers of commerce.

In trade between the Socialist countries the arbitration commissions derive their competence from treaties or general conditions agreed upon by the governments and individual submission to arbitration by the parties is unnecessary and does not occur in the contracts. As a rule the arbitration commission of the defendant party's country has jurisdiction over the matter³⁴⁹.

In trade between Socialist and non-Socialist countries the Socialist arbitration commissions will only have exclusive jurisdiction when the parties have provided for it in the contract. This is frequently done. Maritime cases in the Soviet Union and in the German Democratic Republic, Czechoslovakia and Poland are brought before the maritime arbitration commissions³⁵⁰.

In earlier decisions by the Soviet³⁵¹ and the Czechoslovak³⁵² arbitration commissions for foreign trade the choice of the arbitration tribunal was mentioned as one of several connecting elements leading to the application of the *lex fori*. This is probably still the attitude of the Czechoslovak arbitration commission³⁵³. Later the Soviet Russian arbitration commission seems to have abandoned this approach. Now submission to arbitration in Soviet Russia is not even considered a connecting element³⁵⁴. The same attitude emerges from the decisions of the Hungarian and Bulgarian arbitration commission³⁵⁵. The position of the arbitration commission of Romania is doubtful³⁵⁶. As for the arbitration commission of the German

Democratic Republic, its former attitude was to regard a submission to the arbitration commission as a tacit choice of the law of the German Democratic Republic. In 1957 a statute was enacted providing that the commission should apply the rules of private international law³⁵⁷. Some authors have regarded this as a directive to the commission to give up the regular application of the *lex fori*³⁵⁸, but Fellhauer, a leading authority in the German Democratic Republic maintained that no change had taken place³⁵⁹. However, on several occasions during the period between 1959 and 1977, the East German Arbitration Commission applied the law with which the contract had its closest connection and not the *lex fori*³⁶⁰.

(3) Critique

A. *Jurisdiction clauses*. — It is always more cumbersome and costly to apply foreign law rather than the *lex fori*. When the substantive and the procedural aspects of the case are governed by the *lex fori*, the parties and the courts are relieved of difficult questions of qualification and adaptation which often arise when foreign law has to be applied to the substance of the case. It is therefore submitted that for good reasons the courts of many countries have been eager to assume that parties who have agreed to submit to the jurisdiction of the courts of a certain country intended to apply the law of the chosen *forum*. It is true that in many cases the parties did in fact so intend. Business people often identify *forum* with *jus*.

In face of the inclination of most courts to apply the *lex fori* the parties and their lawyers may be assumed to know the effect of inserting a jurisdiction clause in their contract. If occasionally they do wish to exclude the implication that the adoption of the clause constitutes a choice of law, they must state this intention expressly in the contract. Consequently, those courts which have established a presumption that a jurisdiction clause indicates a tacit choice of law may legitimately continue to do so.

On the whole the suggestion that according to the Hague Convention on the Law Applicable to International Sales of Goods a submission to the jurisdiction of a particular country cannot *per se* be accepted as a choice of law by the parties does not deserve support, and it is understandable that in 1955 the West German Government raised objections to this rule³⁶¹.

A jurisdiction clause, however, only creates a presumption of an intention to apply the law of the chosen court³⁶². When the parties agree after the conclusion of the contract to submit to the jurisdiction of a court in a particular country or where the contract gives the parties an option to choose among the courts of several countries, the *forum* was unforeseeable at the time of contracting³⁶³ and the parties could not at that time have had any intention of selecting the law of the *forum* to govern their contract. Where the parties have agreed to submit to the jurisdiction of the court of a country where a well-known practice exists of not regarding a submission clause as a tacit choice of the law of that country, courts elsewhere should not either regard such a clause as a tacit choice of that law. Other instances can also be cited where it is impossible to interpret the submission clause as a tacit reference to the law of the court³⁶⁴.

B. Arbitration clauses. — The reasons mentioned in favour of a presumption that the law of the chosen court was intended to apply in case of a jurisdiction clause also hold good where the submission is to arbitration in a particular country. Where business men are chosen as arbitrators they will be even more interested than judges in applying their own law and in avoiding the intricacies of private international law.

The same exceptions as were mentioned above respecting jurisdiction clauses will also apply here: an option for the plaintiff to select arbitration in one of several countries or a stipulation whereby disputes are to be settled by arbitration in the defendant's country, or a submission to arbitration agreed upon after a dispute arose, do not, in general, indicate that the parties intended the law of the place of arbitration to apply. No presumptions in favour of the *lex arbitri* should exist in these cases.

Furthermore, a submission to an arbitral tribunal which does not itself consider the submission as an indication of a choice of the law of the country where the arbitration is to be held, such as the Soviet and other arbitration commissions of the Socialist countries, cannot be treated anywhere as evidence of a choice of law.

The same applies to an agreement to submit to an international arbitration such as that by the International Chamber of Commerce. When the parties have provided for arbitration under the rules of the International Chamber of Commerce the Committee will usually

see to it that an arbitrator is selected from a country to which none of the parties belong and will fix the place of arbitration. The arbitrator will not apply the law of his own country, and generally not even the conflict rules of that country. Nor will he apply the law of the place of arbitration. Some arbitrators, however, have applied the conflict rules of the country where they heard the case³⁶⁵.

(ii) *Other factors indicating a tacit choice of law*

Besides the submission clause other factors may indicate a tacit choice of law. The parties may have referred to the customs of a certain place, for instance the customs of a certain stock exchange³⁶⁶, they may have referred to the provisions of a statute of a certain country. Charter-parties may refer to the British Carriage of Goods by Sea Act or to the corresponding American Federal Statute. Expressions such as the "Queen's Enemies" may indicate that the parties envisaged the application of English law³⁶⁷. A number of German standard form contracts contain a provision to the effect that the obligations of both parties are to be performed at the same place, which is located in Germany³⁶⁸. The fate of such a clause under the new Act of 25 July 1986 which does not rely on the place of performance as a decisive connecting factor is uncertain. Many English contracts state that they are made in London or are to be regarded as having been made in London. Other indications of a choice of law may be found in the use of a certain language for the contract or of a certain currency of payment³⁶⁹.

All these factors occur in such different contexts and in such different situations that it will depend upon the circumstances of the case whether they should be taken as proof of a tacit intention. Choice of language³⁷⁰ and choice of currency³⁷¹ are seldom decisive. Charter-parties and bills of lading are very often written in English, and this will rarely permit the conclusion of an implied choice of law³⁷². Reference to statutes or to customs³⁷³ may indicate a choice depending upon how many of the legal aspects of the contract the statute covers. A reference in a contract of sale to the Sale of Goods Act 1979, enacted in the United Kingdom, may mean a choice of English law. However, a reference to the American Harter Act in a bill of lading is often made only in order for the document to be employed in trade with the United States whose courts apply the

Act to all cargoes to and from an American port, and will in most cases be no proof of a party reference to American law or to the law of any of the states of the Union.

More important is the use of legal institutions known in one country and not in the other. A German and an Englishman setting up a trust together may be taken to have chosen English law for their agreement³⁷⁴. If a loan is negotiated and financed in accordance with the practice in the United States, a strong presumption arises that the parties intended to apply the law of one of the states of the United States³⁷⁵.

For other indications of intention see *infra*, 3 (d) (v).

(e) *Change of law after the contract is made*

(i) *The problem*

May parties who failed to exercise a choice of law when making a contract do so later? May parties who selected the law governing their contract change their mind later on and select another law?

In practice this problem arises mostly when the parties agree in court to submit to the law of the *forum*.

(ii) *Common law countries*

In common law countries parties may select the law of the *forum* in the course of the proceedings or even during the trial. An express agreement is not needed³⁷⁶. The mere failure to plead foreign law – or to prove it – will lead to the application of the *lex fori*³⁷⁷.

In the absence of any relevant practice it seems doubtful whether the courts of the common law countries will allow parties to select a law (other than the law of the *forum*) after the conclusion of the contract or subsequently to change their previous choice of law. Collins is disinclined to allow a subsequent choice³⁷⁸, and there are some indications in English cases to the same effect³⁷⁹. Generally, however, the parties will be free to discharge the contract and to enter into a new agreement to be governed by a different legal system.

(iii) *Civil law countries*

The law and practice in most civil law countries permit the parties to choose the law of the *forum* even when this choice is made up to or during the oral proceedings in court³⁸⁰, as do the courts

of the common law countries. This, at least, holds true as regards those types of contracts for which the parties may freely agree to select the proper law³⁸¹. In such cases the *lex fori* will be applied if none of the parties pleads foreign law. In these circumstances the parties are also free to change their previous choice of law by selecting another law which is not that of the *forum*.

It is probable that the principles stated above would also be acceptable to Socialist countries³⁸², with the exception that in these countries the courts and the arbitrators must apply the conflict rules of the *forum ex officio* and that foreign law will be applied even though a party does not invoke its application³⁸³. It is, however, not known whether in a Socialist country a court of arbitration may ask the parties whether one of them wants to have foreign law applied and if not whether it will then comply with an agreement of the parties to submit to the law of the *forum*³⁸⁴.

In West Germany the parties may agree on the law applicable to the contract at any time after conclusion of the contract³⁸⁵. They may change a previous agreement as to the proper law even during the hearing in court³⁸⁶. This practice has now been confirmed by Article 27 (2) of the German Act on Private International Law of 30 June 1986 which enacts the rules of the Rome Convention.

West German courts also allow a tacit choice of the law of the *forum*. If in court the parties rely on the substantive provisions of the law of the *forum* this is regarded as a tacit agreement to apply the law of the *forum*. Even when one party refers to the rules of West German law and the other party does not raise objections to the application of West German law this has frequently been understood to be a common "presumed intention" of the parties to apply German law³⁸⁷.

If the pleadings of the parties in court do not provide any guidance as to the applicable law a West German court must apply the conflict rules of the *forum ex officio*³⁸⁸. In cases involving contracts where the parties may agree on the applicable law a West German court may ask the parties whether they want to invoke the application of foreign law. However, within the framework of the West German civil procedure, the trial court is probably not obliged to draw the attention of the parties to this question³⁸⁹.

The Scandinavian countries have adopted the same attitude towards a subsequent change of the chosen law or of the law objectively ascertained as that to be found in West Germany. In so far

as the parties were allowed to select the law governing the contract when they made their agreement they will also be allowed to make a subsequent change in the choice of law³⁹⁰.

The Swiss Federal Tribunal allows a subsequent choice of law by the parties, but requires that it must be made consciously by both parties³⁹¹. If the choice is exercised during the trial both parties must know that they may choose between foreign and Swiss law, and, being aware of this, they must express the intention to apply Swiss law³⁹². If they fail to do so, the court must apply *ex officio* the law originally chosen by the parties or, failing such a choice, the law which originally applied in its absence.

Italian courts seem to have taken a separate stand. In a famous decision rendered by the United Chambers the Italian Court of Cassation has held that a legal system once chosen by the parties cannot be changed later³⁹³. It seems to follow from this and from other decisions of the Supreme Court that the parties cannot agree on the applicable law after the contract has been concluded and that it is the duty of the court to apply foreign law³⁹⁴. When its own rules of the conflict of laws refer the court to a particular system of laws, it must apply that law and inquire into its substance.

The Rome Convention 1980, Article 3 (2), is in accordance with the laws of most countries of the European Communities. It provides that the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice or of other provisions of the Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

The purpose of the reservation concerning the formal validity is to avoid uncertainty in cases where the new law imposes formal requirements unknown under the first law. In these cases the contract was valid during the period before the new law was chosen³⁹⁵.

Article 7 (2) of the Hague Sales Convention 1985 contains a provision similar to Article 3 (2) of the Rome Convention.

(iv) Critique

There seems to be no valid objection to a choice of law made subsequent to the formation of the contract. Those who have opposed it have done so on conceptualistic grounds. They argue that the law of the contract is "law" and a law once made to govern

cannot be changed by the will of the parties. The same kind of argument has been raised against an initial choice of law by the parties, but in vain³⁹⁶.

Should, however, a subsequent choice of law be allowed even when the type of contract precludes an initial choice? It is difficult to give a general answer to this question. Where the bargaining position and the situation of the parties remains the same as it was when the contract was concluded, no reason can be adduced for giving the parties a freedom of choice which they did not have initially. After legal proceedings have been started, the position may be different. Several systems of civil procedure permit a party to waive a claim of his own or an objection to a claim made by the other party which he could not validly waive at the time of making the contract; when a party can waive a substantive right in court he should also be permitted to exercise a choice of law which would imply a waiver of the right.

When validly made, the subsequent choice should, as a rule, be given retroactive effect to the time when the contract was concluded. However, third parties who have profited by the initial choice of law should not be deprived of their rights through a subsequent choice of law. If, for instance, the original law governing a life insurance contract conferred an irrevocable right upon a third-party beneficiary, he should not be deprived of it by a later choice of a law which does not accord such a right to be the third-party beneficiary³⁹⁷.

As provided by the Rome Convention 1980, a later choice of law shall not prejudice the formal validity of the contract under the first law. The same prospective effect should in some cases apply to its essential validity. Acts validly done under the contract in reliance of the first law shall not later be deemed ineffective under the new law.

The requirement in Swiss law that a choice of the law of the *forum* in the course of legal proceedings should be made in full knowledge of the problem involved and of the possibility of a choice seems to be basically sound. It does not seem appropriate, as some West German courts have done, to assume a neutral attitude and let the hazards of the pleadings decide. Parties and their counsel may plead rules of the *lex fori*, because they are unaware of the problem. That law is then applied in accordance with what is believed to be the tacit or presumed intention of the parties.

When counsel fails to plead any rules of law at all, the West German courts must apply foreign law *ex officio*. If the trial court has omitted to offer guidance to the parties and has applied foreign law when the parties have ignored the issue, the pleadings may have missed the point in law and in fact. This, it is submitted, is unsatisfactory and it is understandable that the West German courts have gone far in their search for a presumed intention of the parties to apply the *lex fori*.

Therefore, if the parties do not indicate clearly the law to which they intend to submit their contract, the trial court should ask the parties whether they both intend to rely on the law of the *forum*. Few systems of civil procedure will prohibit a court from putting such a question to the parties. If this question is permissible, the court should, however, only raise it if the necessary information on the foreign law involved is either easily obtained or if the case is sufficiently important – either because of the value of the object or because of its consequences – to warrant a time consuming and costly process of collecting information on foreign law.

If the case is clearly not sufficiently important to justify the collection of evidence on foreign law, the *lex fori* should apply unless the parties plead foreign law. Some writers assert that it is the duty of the courts always to apply the foreign law *ex officio*³⁹⁸. In cases of minor importance this endeavour to secure the ideal solution seems to be unrealistic³⁹⁹.

3. *The Proper Law in the Absence of An Effective Choice of Law by the Parties*

(a) *Introduction*

(i) *The methods*

As was mentioned in Chapter I above the legal systems of the world present considerable variations in their methods and rules when determining which law to apply if the parties have not made any effective choice of law. At the one end of the spectrum figures an inflexible rule, notably that which requires the application of the law of the place of contracting. At the other end the most flexible method is to be found whereby the choice of the applicable sub-

stantive rule with respect to the issue before the court depends, *inter alia*, upon the policies behind the conflicting substantive rules. Between these two extremes a flexible method which determines the proper law of each individual contract by weighing the connecting factors attracts the support of courts in many countries. The adherents of this method, however, are divided into several schools. One wishes to supplement the determination of the proper law by presumptions such as those that the law of the seller governs contracts for the sale of movables and that the law of the place of work governs contracts of employment. Another advocates that each case should be decided on its own merits and that the relevant connecting factors should be weighed without the aid of any presumptions. There is also disagreement as to what considerations should influence the weighing of the connecting factors. One school claims to weigh them only in the light of the intentions and interests of the parties. Another attaches weight to social considerations as well.

(ii) *Terminology: subjective and objective method*

In this chapter the subjective method denotes one which seeks to ascertain the intentions and interests of the parties. The subjective method relies on the individual interests of the parties in the concrete case before the court or in analogous cases. This method attempts to ascertain the law which both parties were interested to apply or which the stronger party was able to impose upon the weaker. The notion of the *objective method* is used here as one which looks to the interests of the international community by ensuring that the law of that country applies which has the greatest interest in regulating the contract in question in order, for instance, to protect the interests of the weaker party or those of third parties.

(iii) *Connecting factors and indications of intention*

In paying regard to the interests of the Community the courts will consider the connecting factors. Connecting factors are those that establish a connection between the contract and either (1) the contractual *acts*, e.g., the formation and the performance of the contract, or (2) the *subject-matter* for the contract, e.g., the situa-

tion of a movable or immovable, the place of a register where a transaction was filed, or (3) the *parties* to the contract, their residence, their domicile or their nationality⁴⁰⁰. These contacts – for example the place of contracting and the place of performance – may, however, also carry weight when the courts follow the intentions and interests of the parties in their choice of law. It can, for instance, often be assumed that parties who negotiated their contract at the place of business of one of them or who contemplated performance of the contract in a certain country intended the law of the place of negotiation or the law of the place of performance to govern their relationship.

Other contacts between a contract and a legal system are significant only when regard is had to the interest of the parties in applying that law. The agreement between the parties that the courts of a given country shall have jurisdiction in matters arising out of the contract and a clause providing for arbitration in a certain country may, if not considered to be tacit party references (see *supra*, 2 (d) (i)), denote an interest in applying the law of the agreed *forum*. The use of a standard form contract developed in a certain country or of the legal language or legal terms of a given country may also indicate an intention to apply the law of that country. The fact that the contract is valid under the law of one country and – wholly or in part – invalid under the law of another country may indicate an intention of the parties to apply the law which will uphold the contract. When searching for the intention of the parties the court will take these factors into consideration. These relationships which are of importance only when a subjective method is being followed are here termed indications of intention.

This terminology, which contrasts connecting factors with indications of intention and objective with subjective methods, has been used in order to avoid a confusion created by some authors. They assert that the law of the contract can be ascertained exclusively by what they call an “objective” method and that the parties’ intention should be left out of consideration. Although these writers call it an objective method, they profess to be guided by those connecting factors which can indicate both the interests of society and the intentions of the parties in the application of a certain law, and they also seem to maintain that the courts follow an “objective” method when paying regard to those factors which only indicate the intentions of the parties⁴⁰¹.

(b) *Methods and rules of the various legal systems*(i) *Inflexible rules*(1) *The lex loci contractus*

A. *The lex loci contractus as a rigid rule.* — During the eighteenth and the first part of the nineteenth century the law of the place of contracting was applied as an inflexible rule in most countries (see *supra*, Chapter I, 2). It was well suited to most contracts which during that period were entered into and performed at the same time and at the same place. The change in the patterns for concluding and performing contracts in the latter part of the nineteenth century led some countries to abandon this exclusive reliance on the *lex loci contractus* or to fall back on it only in the last resort when the contract could not be localized.

In some countries, however, the rule survived the change in commercial practices and has remained a fixed conflicts rule. In one country, the Soviet Union, the rule has even developed from what was a presumption into a rigid rule.

Most of the countries applying the law of the place of contracting as a rigid conflicts rule have provided so by statute. In Europe this is true of Italy⁴⁰², Portugal⁴⁰³, and the Soviet Union⁴⁰⁴, in Asia of Taiwan⁴⁰⁵, Iran⁴⁰⁶ and Japan⁴⁰⁷, in Africa of Zaïre⁴⁰⁸ and in Latin America of Brazil⁴⁰⁹ and Costa Rica⁴¹⁰. The retention of this rigid rule is probably to be explained by tradition. It was adopted at a time when in the old world the application of the *lex loci contractus* had been advanced by the majority of writers of repute and was the predominant conflicts rule embodied in legislation and in the practice of the courts. The Austrian Civil Code of 1811 and, more specifically, the Italian Civil Code of 1865 required the application of the *lex loci contractus* and these enactments influenced some countries of the Latin world. Japan is known in 1898 to have followed an early draft of the German Civil Code; the specific provision, however, was later dropped in Germany⁴¹¹.

In some countries, and among these in the Soviet Union, Brazil, Japan and Zaïre the law of the place of contracting always governs, but in other countries the principle applies subject to a reservation: if the parties belong to the same country, the law of that country applies. The law of the common nationality prevails over the *lex*

loci contractus in Italy, Taiwan and Costa Rica, and the law of the common residence in Portugal.

B. *The place of contracting.* — A number of the statutes determine the place of contracting in contracts made *inter absentes*. In Brazil⁴¹², Taiwan⁴¹³ and Japan⁴¹⁴ the place of contracting is the place from where the offer was sent. In other countries the Code does not contain any provisions in the section dealing with conflict of law, but the substantive rules determine the place of contracting for the purpose of the conflict of law. In Italy it is the place where the acceptance of the offer reaches the offeror⁴¹⁵. A similar solution has been reached in the Soviet Union.

C. *Soviet Russian law before 1961.* — A remarkable feature of Soviet Russian law in matters of conflict of law relating to contracts is that it moved from flexibility to inflexibility.

The Code of Civil Procedure of 1864 sanctioned the application of the *lex loci contractus*⁴¹⁶. In the last decades before the Revolution of 1917 this rule was interpreted as creating only a presumption in favour of the application of the *lex loci* and in some cases the Supreme Court applied the law of the place of performance, especially when that place was situated in Russia⁴¹⁷.

This practice did not change radically in the first years after the Revolution. The Codes of Civil Procedure of some of the Soviet Russian Republics enacted in the 1920s provided that the courts *must* apply the law of the place of contracting, but the Code of Civil Procedure of the Russian Republic contained a more flexible solution. According to Article 7 the courts should “take the law of the foreign place of contracting into consideration”. It thus left it to the discretion of the courts and of the Foreign Trade Arbitration Commission whether they would find it appropriate to apply the law of the foreign place of contracting⁴¹⁸.

The law of the place of contracting was undoubtedly the main rule of the Foreign Trade Commission which, sitting in the Russian Republic, applied the conflict rules of that republic. In several cases the Commission referred to Article 7 and applied it as a multilateral conflict rule leading to the application of the foreign *lex loci contractus* for contracts made abroad and to the application of the law of the Russian Republic to contracts made in Moscow⁴¹⁹.

However, it was not clear how strictly the Foreign Trade Arbitration Commission concentrated on the *lex loci contractus*. On

the one hand it never advocated a flexible method. For instance, it never relied on the presumed intention of the parties. Such a reliance was and is rejected by writers as "an elastic rule of bourgeois origin invented by the courts of an imperialistic epoch"⁴²⁰. On the other hand the commitment of the Arbitration Commission to the rule of the *lex loci* was not absolute. There were lapses. Other connecting elements besides the place of contracting were called in aid in order to supply reasons for applying a particular law, and in a few cases the law of the place of performance was applied instead of the law of the place of contracting⁴²¹.

The method of enumerating several connecting elements was probably abandoned in the 1950s⁴²². From then on the place of contracting was relied upon exclusively. This new approach was, however, adopted without publicity.

D. *Soviet Russian law after the adoption of the Fundamentals of Civil Legislation of 1961*. — The Fundamentals of Civil Legislation of the USSR and the Union of Soviet Republics of 1961⁴²³, Article 126, paragraph 1, now provide for a multilateral and inflexible conflict rule:

"The rights and duties of the parties to a foreign trade transaction shall be determined pursuant to the laws of the place where it is concluded, unless otherwise provided for by agreement of the parties."

Theoretically, this rule gives Soviet Russian law and foreign law the same scope of application, and this may be an explanation of the new formulation. The arbitration commissions must show complete impartiality in their handling of foreign trade transactions. Such an inflexible conflicts rule is meant to allay any fear of preference for the *lex fori*.

Article 126, paragraph 1, also applies to contracts made *inter absentes* as did RSFSR Code of Civil Procedure, Article 7. According to Article 126, paragraph 4, the place of contracting is determined by Soviet Russian law.

Where, then, is the place of contracting according to Soviet Russian law in contracts made *inter absentes*? According to RSFSR CC (1964), Articles 162 and 163, paragraph 2, a contract is regarded as concluded when the acceptance reaches the offeror. From this rule Makarov deduces that a contract is also regarded as concluded at the place where the offeror received the acceptance⁴²⁴.

Most Soviet Russian State trading enterprises reside in Moscow, and in most cases they make their offers and accept the offers of others in Moscow. It is not known how far the State trading enterprises have succeeded in concluding their contracts with representatives of Western enterprises who attend in Moscow and how far in contracts made *inter absentes* they have attempted and succeeded in locating the place of contracting in Moscow. Sometimes Soviet Russian foreign trade enterprises have stipulated that: "This contract is considered to have been made in Moscow" or they have simply inserted "Moscow . . . (date) . . ." before or after the contract clauses. Clauses of this kind are considered by the arbitration commission to mean that the law of the stipulated place of contracting is applicable because the parties are entitled to agree on a place of contracting⁴²⁵. No conclusive evidence has come to light that in individual cases the Foreign Trade Arbitration Commission has shown an unwarranted tendency to apply the *lex fori*. In at least two cases decided after 1962 the place of negotiation was situated in England, and the Commission applied English law. In one of the cases it expressly refused to make use of the doctrine of *renvoi*⁴²⁶.

E. *Exceptions in Soviet Law.* — The General Conditions of Delivery of Goods 1979 and the General Conditions for Erection of Plant and Machinery and the supply of other services in connection therewith of 1973 apply to foreign trade transactions concluded between Soviet enterprises and the foreign trade enterprises of other members of the Council of Mutual Economic Assistance (CMEA). They provide that the substantive law of the seller/contractor applies. The rules are inflexible and mandatory (see *supra*, 2 (b) (vii)).

Although Lunz is unable to refer to any practice concerning the law applicable to contracts of employment, he is nevertheless of opinion that these contracts are not governed by the ordinary conflict rules respecting contracts⁴²⁷. Which conflict rules apply is uncertain. It is likely that foreigners employed in the Soviet Union enjoy at least the same treatment as Soviet Russian workers.

(2) *The lex loci solutionis*

F. *Latin America/Turkey.* — Some Latin American countries are well known for their rigid adherence to the principle that the law of the place of performance applies⁴²⁸. The Peruvian Civil Code

of 24 July 1984 provides in Article 2095 for the application of the law of the place of performance as a fixed rule; if the performance is to take place in different countries the law of the place of the principal (characteristic) performance applies. If the characteristic performance cannot be determined the law of the place of contracting governs the contract, and this law also applies if the place of performance has neither been expressly designated in the contract nor follows clearly (*inequivocamente*) from the nature of the obligation in question⁴²⁹. The approach of the Peruvian Code is similar to that which has been adopted by the Montevideo treaties of 1889⁴³⁰ and of 1940⁴³¹. According to the Treaty of 1940, Article 40, contracts, the place of performance of which cannot be ascertained, are governed by the law of the place of contracting.

A remarkable feature of both treaties is that they contain provisions determining the place of performance. The place of performance of contracts relating to generic or fungible goods is the domicile of the debtor. Services, if concerned with objects, are to be performed at the *situs* of the latter, or if their effect is connected with a certain locality, then at the place where the effect is to materialize, and in all other cases at the domicile of the debtor⁴³².

The Turkish Act on Private International Law of 20 May 1982 provides in Article 24 that, in the absence of an express choice of law by the parties, a contractual obligation is governed by the law of the place of performance; if there are several places of performance the law of the place of the characteristic performance applies. If it is not possible to determine the place of performance the contract is governed by the law of the place to which it is most closely connected⁴³³.

(3) Several rigid rules

A. *Poland, East Germany, Hungary and Spain.* — In 1908 the Institut de droit international adopted draft rules concerning the conflict of laws in matters of obligations. They contained a catalogue of rules consisting of presumptions⁴³⁴.

The Polish Act of 1926 on Private International Law contained a similar catalogue consisting, however, of rigid rules and the Act of 12 November 1965, which replaced it, follows suit. The law of the *situs* is applicable to sales of immovables⁴³⁵; this rule is mandatory. In all other cases the law of the common domicile applies in the absence of an agreement between the parties⁴³⁶. In case the

parties do not have a common domicile a set of special rules governs the various contracts. There are provisions for the sale of movables, *locatio conductio operis*, agency, transport, bailment, insurance, publishers' contracts⁴³⁷, labour contracts⁴³⁸ and contracts concluded at exchanges and on public markets⁴³⁹. Contracts which are not covered by these rules are subject to the law of the place of contracting⁴⁴⁰.

The East German Law of 5 December 1975 on the Application of Law also provides a catalogue of fixed rules for more special contracts than the Polish Act. Most contracts covered in this catalogue are to be governed by the law of the seat of the enterprise performing the characteristic obligation (section 12, paragraph 1). For contracts not mentioned in the catalogue this law also applies. When the characteristic obligation cannot be ascertained, the law of the State applies in which the offeror received the acceptance of the offeree (the place of contracting (section 12, paragraph 2)). Contracts concerning transfer of interests in land situated in East Germany are governed by East German law (section 12, paragraph 3) and labour relationships are governed by the law of the seat of the employer (section 27, paragraph 1), unless the place of work is situated in the same country as the habitual residence of the employee in which case the law of the place of work applies (section 27, paragraph 2). The rules in section 12, paragraph 3, and section 27, are mandatory⁴⁴¹.

A similar approach is found in the Hungarian Ordinance of 1979 on Private International Law⁴⁴². In the absence of a choice of law by the parties a catalogue of fixed rules governs a number of specific contracts such as sale, lease, assignment of copyrights and of industrial property rights, bailment, agency, transport, loan provided by a bank, insurance, etc.⁴⁴³. Most of the rules provide for the application of the law of the habitual residence or place of business of the party who is to effect the performance which characterizes the contract⁴⁴⁴. This is also the rule applicable to contracts which are not covered by the catalogue. Only in case the law applicable cannot be determined in this manner the contract is governed by the law with which it is most closely connected⁴⁴⁵.

In Spain the *titulo preliminar* of 29 July 1974 to the Civil Code, Article 10, paragraph 5, provides that in the absence of an express choice of law by the parties the law applicable to contracts is the law of the common domicile of the parties; if they have no common

domicile, then the law of their common habitual residence, and if they have no such common residence then the law of the place of contracting applies. Contracts made *inter absentes* are presumed to have been made at the place where the offer was made, see Spanish CC, Article 1262 (2). However, contracts regarding immovables are governed by the law of their *situs*, and contracts for the sale of movable goods which are concluded in commercial premises are governed by the law of the *situs* of these enterprises. Sales made between two commercial enterprises are governed by the law of the *situs* of the seller.

In Article 10, paragraph 6, it is provided that the law of the place of work applies to employment contracts, and in paragraph 7 that gifts are to be governed by the law of the domicile of the donor⁴⁴⁶.

B. *The Hague Convention on the Law Applicable to International Sales of Goods* of 1955 also establishes a set of rigid rules. These rules are in force in France, Belgium, Italy, Switzerland, in the four Nordic countries, Denmark, Finland, Norway and Sweden, and in the African Republic of Niger.

Article 3 (1) of the Convention provides that in the absence of a choice of law by the parties a sale is governed by the substantive law of the country where the seller had his habitual residence at the time he received the order. If the order is received by the branch office of the seller, the law of the country governs where the branch is located.

There are, however, two important exceptions to this rule.

First, Article 3 (2) provides that the substantive law of the country in which the buyer has his habitual residence, or in which the branch of his business is situated that has placed the order, governs if the order has been received in that country either by the seller or by his agent. If, for example, the agent of the French seller has received the Swedish buyer's order in Sweden, Swedish substantive law will apply.

Second, according to Article 3 (3) a sale effected at a commodity exchange or at a public auction is governed by the substantive law of the country in which the exchange is located or in which the auction takes place.

When in 1964 the Convention became effective consumer purchases were covered by the rules of the Convention. The fourteenth session of the Hague Conference on Private International Law in

1980 agreed that the States which were parties to the Convention should be permitted to exclude consumer sales from its scope of application. At the same session texts were adopted on the law applicable to certain consumer sales. It was left to the Extraordinary Session to be held in 1985 to decide whether to include the articles set forward in these texts in the new Convention on the Law Applicable to International Sales of Goods or to make these texts the subject of a separate convention. At the Extraordinary Session in 1985 the Conference did neither the one nor the other. What will happen to the texts adopted in 1980 is not known.

The texts on certain consumer sales were applicable to cases, similar to this, described in Article 5 of the Rome Convention⁴⁴⁷ where the seller has sought out the consumer in the country of his habitual residence. In the absence of a choice of law by the parties the law of the country where the buyer had his place of business at the time his order was given should govern the contract, see Article 7 of the texts. This rule was meant to be a hard and fast rule. It should also govern cases where the contract is more closely connected with the law of the seller or with that of another country. Thus German law would apply to a sale by a Swedish seller to a German consumer who has a summer house in Sweden, who has been approached by the seller in Germany to buy equipment for the summer house, and who sent his order from Germany.

A similar inflexible rule governing contracts for the supply of goods and services to consumers who have been sought out by their suppliers in their home country has been provided in Article 5 of the Rome Convention 1980, see on this provision *supra*, 2 (c) (iii) (6) and *infra*, (ii) (2) G.

(4) *Quasi-inflexible rules: the Austrian Federal Act of 1978 and the Hague Sales Convention 1985*

In section 1 of the Austrian Federal Act on Private International Law it is provided that "cases of a private law character containing a foreign element are to be governed by the legal system to which they have the strongest connection"⁴⁴⁸. The rules of the Act are to be regarded as expressive of this principle". The legislator has given the courts "the firm guidelines they need". On the other hand the Act is not intended to "curtail the necessary flexibility of the judicial process too much"⁴⁴⁹ and to paralyse development. This seems to mean, although it is not quite certain, that the Act has adopted

a system of quasi-inflexible rules which apply equally to issues regarding family relations, succession, property and contracts, etc.

In the part of the Act dealing with obligations the main rule for contracts is laid down in paragraph 36 which states that contracts providing reciprocal obligations are governed by the law of the habitual residence of the party who is not to perform the money obligation; if that party is an enterprise the law of its place of business applies. The following sections (27-45) provide a number of additional special rules where this principle does not apply such as contracts made at exchanges, auctions, fairs and markets, contracts regarding the use of land, employment contracts and consumer contracts. The Act contains no rule for contracts which are not covered by the general rule in section 36 and the following special rules in sections 37-45 such as barter, joint ventures and other co-operation agreements. For these contracts the principle in section 1 on the strongest connection will apply⁴⁵⁰.

The provision in section 5 on *renvoi* also applies to contracts⁴⁵¹. *Renvoi*, however, does not operate when the parties have made a choice of law, see section 11 (1).

Quasi-inflexible rules have been provided in the Hague Convention on the Law Applicable to International Sale of Goods of 1985.

Article 8 (1) lays down that in the absence of a choice of law by the parties the contract is governed by the law of the State where the seller has his place of business at the time of the conclusion of the contract.

From this general rule there are exceptions.

First, under Article 8 (2) the contract is governed by the law of the State where the buyer has his place of business at the time of the conclusion of the contract if

(a) negotiations were conducted and the contract concluded by and in the presence of the parties, in that State; or

(b) the contract provides expressly that the seller must perform his obligation to deliver in that State, or

(c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tender).

Second, Article 8 (3) lays down, by way of exception, that where in the light of the circumstances as a whole, for instance, any business relationship between the parties, the contract is manifestly

more closely connected with a law which is not the law applicable under Article 8 (1) and (2) the contract is governed by that law. This is the cautious opening to flexibility. However, member States may make a reservation not to apply Article 8 (3). Furthermore, it does not apply in respect of issues regulated in the CISG when the sale is made between parties having their places of business in different States which are parties to that convention.

Third, a sale by auction or on a commodity exchange is governed by the law of the State where the auction takes place or the exchange is located. This rule is inflexible, see Article 9.

(ii) *Flexible methods*

(1) *Countries relying upon individual solutions*

A. *The presumed intention of the parties in nineteenth-century Europe.* — During the nineteenth century several European countries, among them England, Germany, France, Switzerland, Belgium and the Scandinavian countries abandoned the former rigid rule of the *lex loci contractus* (*supra*, Chapter I). A more flexible approach was preferred and in accordance with the ideology of the nineteenth century the intention of the parties was relied upon⁴⁵². The proper law of the contract was the law by which the parties intended or might fairly be presumed to have intended the contract to be governed. This standard gave the courts freedom from the tyranny of fixed tests. International contracts which cover a multitude of often unpredictable combinations of facts and which show a surprising tendency of their connecting factors to shift could not be fitted into the strait-jacket of a fixed rule. By relying on the test of the presumed intention of the parties, the courts were able to weigh the connecting factors of each contract. They were also able to follow the homeward trend. In almost every country it was, as Beale said in his comment on English case law, remarkable to notice the great regularity with which the courts found by various methods that it was the law of England which was intended by the parties⁴⁵³. The law of the *forum*, however, was not applied in every case, and in most of the countries no rules and not even presumptions were established.

On the European Continent writers such as Pillet and Niboyet⁴⁵⁴ in France and von Bar and Zitelmann⁴⁵⁵ in Germany tried to discredit the usefulness of reliance on the presumed intention of the

parties. They claimed that the presumed intention was a fiction and that in most cases no intention or at least no common intention could be deduced from the contract and its circumstances.

In England, Westlake expressed the same view⁴⁵⁶. These authors, however, did not succeed. The presumed intention survived and thrived as a useful test.

B. *England*. — In England the intention of the parties was established in 1865 as the leading test for determining the law applicable to contracts. It was stressed as an important criterion in *P. & O. Steam Navigation Co. v. Shand*, mentioned *supra*, 2 (b) (i), and was held to be decisive in *Lloyd v. Guibert (ibidem)* decided during the same year. In that case the question arose as to which law governed a contract of affreightment. It was an action by a charterer against the shipowner for the reimbursement of money which the charterer as cargo owner had been obliged to pay to a ship's creditor who had lent the master money on the strength of a bottomry bond of ship, freight and cargo. The contract had contacts with Denmark, Haiti, France, England and Portugal. In the Exchequer Chamber, Justice Willes, speaking for the court said :

“In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter⁴⁵⁷.”

The judge found that the parties were presumed to have submitted to the law of the flag which was French law.

In some of the cases that followed the courts stated that the law of the place where the contract is made is *prima facie* the law which the parties intended to select⁴⁵⁸. This rule was seldom applied in contracts made *inter absentes*, and in some cases it was held that if a contract is made in one country to be carried out between the parties in another country it is to be concluded that the parties intended the law of the place of performance to govern the contract⁴⁵⁹. On the basis of these and other *dicta* Dicey tried to formulate rules based on presumptions⁴⁶⁰, but this attempt to create predictable certainty did not meet with much success. The rules which Dicey derived from *dicta* and from the outcome of some cases were not always followed by the courts. Sometimes the judge warned against attempts to create rules⁴⁶¹. No rule could express

the intention of the individual parties and thus the courts cleared the hurdle of *stare decisis* in the conflict of laws of contracts. As mentioned above the law of England was held very often to have been the law presumably intended by the parties.

In the 1950s and in the 1960s a new formula was used probably under the influence of Batiffol⁴⁶² in France and of Cheshire and Morris⁴⁶³ in England⁴⁶⁴.

The rule stated by the courts was the following: the proper law of the contract is the system of law – or the country⁴⁶⁵ – by reference to which the contract was made or that with which the transaction has the closest and most real connection⁴⁶⁶. This rule allows the courts to take both connecting factors and indications of intention into consideration, and to follow a more objective method. However, there are not many indications that social considerations now play a more important part than earlier in determining the proper law of the contract. The new method has not prevented the courts from applying the system of law which was or was presumed to have been in the minds of the parties also when the contract has a closer local contact with the country of another legal system⁴⁶⁷. The real difference between this version of the centre-of-gravity method and the presumed intention approach has proved to be slight.

It does not seem either that the new formula has made it any easier to predict what law applies. No new rules of presumption have been established by the courts. The authors of the textbook *Dicey and Morris on the Conflict of Laws* have suggested such rules⁴⁶⁸ and their suggestions reflect the practical results of the decisions of English courts, but with very few exceptions neither the *rationes decidendi* nor any *dicta* by the courts refer to rules based on presumptions, nor has the general notion of such rules been endorsed by the courts in England⁴⁶⁹. It seems that, in the absence of an express or implied intention, the most real connection of a contract must be ascertained in each case individually. "Presumptions, once fashionable during the earlier development of English private international law, are now, whether for good or for ill, out of fashion and rejected"⁴⁷⁰. When attempting to supply a rule reflecting the English practice relating to a contract for the sale, pledge or hire of a movable Morris states that it is governed by "its proper law"⁴⁷¹. He might also have stated that no *prima facie* rule has been established by the courts for the sale of movables, the

most important of all international transactions. This unresponsive attitude to rules of presumption will have to be abandoned if the United Kingdom ratifies the Rome Convention 1980 which she has signed, see *infra*, (2).

C. *France*. — In France the intention of the parties was adopted as the principal test in 1910 when the Court of Cassation held that the law applicable to contracts was that which the parties had adopted, and that if parties of different nationalities had not shown an intention, express or to be implied from the facts and circumstances and from the terms of the contract, to select another legal system, the law of the place of contracting applied⁴⁷². Within this pattern the place of performance also came to play an important part, inasmuch as it served to indicate the intention of the parties to choose the law of that place⁴⁷³. The court did not provide guidance, however, as to when the place of contracting or the place of performance assumed importance. The place of contracting, however, was rarely relied upon in contracts made *inter absentes*⁴⁷⁴, and it seems that other contacts, such as the domicile of the parties determined which law was applicable when the place of contracting did not coincide with the law of the place of performance⁴⁷⁵. A discernible intention of the parties could also rebut the presumption in favour of the *lex loci contractus*⁴⁷⁶.

Since 1950 the French courts have used two different formulas to express the rule regarding the law governing a contract.

Until the end of the 1960s the courts, including the Court of Cassation, had mostly relied on the intention of the parties as the decisive criterion. The Court of Cassation had not established any rules but only affirmed the decision below stating that on the basis of the facts of the case the lower court has made the conclusion, which is final, that the parties are presumed to have intended the law of France to govern the agreement⁴⁷⁷. In other words, the proper law is determined by the intention of the parties and that intention is a question of fact which the Court of Cassation cannot review. In such a system rules based on presumption are not easily established. The lower courts can hardly be expected to make attempts in this direction. Their decision on the conflicts question will remain final only as long as the determination of the proper law is regarded as a question of fact. If it becomes a question of law because rules are involved, the supremacy of the courts

disappears and the Court of Cassation can exercise its power of review.

In the 1950s and again in the 1970s and 1980s the courts in some cases would seem to follow the theory of Battifol according to which the parties localize the contract by choosing its centre of gravity⁴⁷⁸. Their choice of the place of contracting, of the place of performance and of other contracts localizes the contract for legal as well as for economic purposes. Following this approach the French Court of Cassation has attached significance to the localization of the contract by the parties and to the economic purpose of the agreement⁴⁷⁹ rather than to the presumed intention. This new formula would make it possible for the courts to pay heed to other considerations than the intention of the parties. The intention may vary from case to case, but the economic function of the contract is in general the same for each individual type. However, the use of the localization and economic purpose of the contract is not *per se* an application of the theory of localization. The Court of Cassation still regards localization as a question of fact left to the "sovereign" appreciation of the courts below, *les juges au fond*. No serious attempt is made by the Supreme Court or the lower courts to shape rules. The use of the terms advocated by Battifol may, of course, eventually lead to the adoption of his theory and to the formation of rules based on presumptions⁴⁸⁰, but by 1985 the new formula did not appear to have led to any change in the substance of the rule.

In the decided cases the courts have held the place of negotiation to be an important contact⁴⁸¹, but other elements have been mentioned to support the application of the *lex loci contractus* and few courts have accepted a presumption in favour of the law of the place of contracting. In some⁴⁸² — but not in all⁴⁸³ — of its decisions the Cour de Paris did not even mention the intention of the parties but enumerated the connecting elements leading to the law applicable to the contract. This enumeration of contacts does not reveal which contacts were regarded determining and thus no rules can be deduced from it.

The Rome Convention 1980 which provides rules of presumption and which has been ratified by France has not yet entered into force.

In 1964 France put the Hague Convention on the Law Applicable to the Sale of Goods in force and thereby adopted fixed rules as far as sales of movables are concerned⁴⁸⁴.

D. *Legislation modelled upon French law.* — The statutes of some countries outside Europe reflect French practice at the beginning of this century⁴⁸⁵. In the absence of a choice of law by the parties the law of the common nationality (or the common domicile) is *prima facie* applicable⁴⁸⁶. If the parties are of different nationality or have different domicile the law of the place of contracting governs. This law and the law of the common nationality or domicile only govern “when the presumed intention of the parties does not refer the court to another law” (Thailand), “when it does not follow from the circumstances of the case that another law is applicable” (Egypt and Syria) or “when it does not follow from the nature of the contract, from the circumstances of the case or from the situation of the goods contracted for that another law is applicable” (Morocco and Tangiers).

E. *Belgium.* — Until recently the practice in Belgium developed on similar lines as in France⁴⁸⁷.

The courts applied the law presumably intended by the parties. To ascertain this law was, as the Court of Cassation had pointed out⁴⁸⁸, a question of fact which that Court cannot review. However, in the absence of an express or implied intention the parties were presumed to have submitted to the law of the place of contracting⁴⁸⁹.

During the last decades the importance of the place of contracting has diminished. The courts now look upon the localization by the parties of the contract⁴⁹⁰. The localization formula has been given a special interpretation by the Court of Cassation. In a leading case from 1974⁴⁹¹ the Court upheld a decision by a lower court which had stated that the contract was governed by the law of the country to which it was most closely connected. The Court of Cassation said that arriving at what the judge called an “objective localization of the contract” having regard to its economy and the circumstances of the case the judge had in reality only invoked the elements which indicated the intention of the parties at the time of the conclusion of the contract.

It is not known why the Court of Cassation offered this subjectivist interpretation of an objective method. Was it to emphasize that questions regarding the law applicable to contracts are questions of fact to be left to the final appreciation of the lower courts and for which no rules of presumption had to be established? Any-

how, the Belgian courts do not seem to have established special rules of presumption for the various types of contract⁴⁹². Belgium, on the other hand, is the only Benelux country which has adhered to the Hague Convention on the Law Applicable to International Sales of Goods of 1955 and thereby to its special rules for contracts of sale.

F. *Scandinavia*. — In Scandinavia the rule that the *lex loci contractus* applies was first abandoned by the Danish courts in 1883⁴⁹³ followed by the Swedish courts at the beginning of the twentieth century⁴⁹⁴. The place of contracting had not, however, been the only contact to be relied upon. In Denmark other connecting elements, such as the domicile of the debtor and the place of performance, had also been taken into consideration, sometimes on the basis of the presumed intention of the parties⁴⁹⁵.

By the beginning of the twentieth century under the influence of Scandinavian⁴⁹⁶ and German writers the law of the domicile of the debtor was applied for preference in most cases in Denmark⁴⁹⁷, Norway⁴⁹⁸, and perhaps also in Sweden⁴⁹⁹ as the law presumed to have been chosen by the parties. The Scandinavian authors all called for the application of the law of the domicile of the debtor, seemingly under the influence of the German jurist von Bar who, with little success, had tried to persuade the German courts to abandon the intention of the parties and the place of performance as tests in favour of the domicile⁵⁰⁰.

After a period of approximately three decades in which the presumption in favour of the *lex debitoris* prevailed, it was formally abandoned in all three countries.

The gold clause bonds issued by the Scandinavian Governments in the United States shortly after the First World War furnished the occasion. The facts were very similar in the claims presented in the three countries, and the legal issue — whether the American Joint Resolution of 1933 abrogating gold clauses applied — was identical. The courts also reached the same solution, namely that the Joint Resolution applied, and that their Governments could pay their debts dollar for dollar without reference to the latter's gold value. In Norway, the Supreme Court unanimously concurred with a *dictum* by Justice Boye that

“a matter like the present should in the absence of any party

agreement on the applicable law be governed by the law of the country with which it has the closest connection, all circumstances taken into consideration⁵⁰¹".

In the corresponding Swedish case⁵⁰², the majority of the Swedish Supreme Court held that in the absence of any agreement between the parties on the applicable law

"this must be ascertained by weighing against each other those objective elements that may be calculated to influence decision in one direction or another".

Less explicitly, the Danish Supreme Court followed the same principle in its decision of 1939 concerning bonds containing a gold clause. However, the Court did not indicate which method it followed, but merely stated that

"in view of the contents of the bonds issued in accordance with the two contracts of loan (with the American Guarantee Trust Company), especially the provisions concerning payment exclusively at the head office of the Trust Company in New York and solely in gold coins of the United States, the obligations of the Danish Government must be held to be governed by the laws of the United States, so that the provisions of the Joint Resolution of 5 June 1933 apply to these bonds⁵⁰³".

On the whole, the method adopted by Scandinavian courts has led to the establishment of very few presumptions. Next to none have been formulated by the courts; a few may, though often with hesitation, be deduced from the cases.

This reluctance to state presumptions may be partly due, at least in Denmark and Sweden, to the use of a special technique in giving reasons. Whereas when the law is doubtful the courts of other countries often formulate their grounds as syllogisms in which both the applicable rule of law and the facts subsumed under this rule are established, the reference to the principles of law is often omitted by Scandinavian, and especially by Danish courts. They only mention those facts that seem relevant. They state for instance: "This contract which is made in Denmark and concerns goods situated in Denmark to be paid for in Danish currency, is governed by Danish law." The reader is left to find out for himself which contact was decisive *prima facie* and what principle was applied. This technique, as has been seen, is not unknown in other countries where questions

involving the conflict of laws in matters of contract arise, but in Denmark and in Sweden it seems to represent a general way of reasoning which is also used in other fields of the law. Norwegian courts are somewhat more inclined to state the law, but in respect of the problems discussed here, they have been reluctant to do it⁵⁰⁴.

Scandinavian writers unanimously favour the adoption by the courts of rules of presumption⁵⁰⁵. It is known that parties and their counsels often accept the existence of such rules in cases which they settle out of court. The presumptions advocated by the writers resemble those which have been adopted in the Rome Convention of 1980 which in 1984 was put into force in Denmark.

G. Other countries. — The Greek Civil Code of 15 March 1940, Article 25, provides that in the absence of an effective choice of law by the parties that legal system applies which is the proper law in view of all the circumstances of the case. This rule which prescribes the application of the law most closely connected with the contract has, as far as is known, not yet led to the establishment by the Greek courts of special rules of presumption⁵⁰⁶.

Section 5 (1) of the Foreign Trade Contracts Act of 21 March 1985 of the Peoples Republic of China lays down that if the parties have not chosen the law applicable to the contract the law of the State applies to which the contract is most closely connected⁵⁰⁷. Section 145 of the General Principles of Civil Law of 12 April 1986 has a similar provision⁵⁰⁸. In January 1988 these provisions are so new that it is not known how they will be applied by the Chinese courts and the Chinese Arbitration Tribunals. The Chinese are not a litigious people, and it may take some time before a case law relating to these provisions has been established.

(2) *Countries Applying a Catalogue of Presumptions*

A. The Rolin draft. — In 1906 the Belgian scholar Rolin prepared a draft of an Act on the Private International Law of obligations. This draft was adopted by the Institute of International Law in 1908⁵⁰⁹, and most of it was included in 1913 in a draft law on private international law for Austria⁵¹⁰. The rules of the Austrian draft covered, *inter alia*, sales of movables, insurance contracts, employment contracts and contracts with members of the professions. The draft also included rules for contracts made on markets, fairs and exchanges and for contracts concerning immovables, as well as

a few general rules for all other contracts. The rules established presumptions. They were not to apply if the circumstances of the case made it evident that a reasonable regulation of business called for the application of another law. The law which was to apply on the strength of a reasonable regulation of business was probably meant to be identical with the law with which the contract had its most real connection. The Austrian Federal Act on Private International Law of 1978 adopted many of the rules of the 1913 draft. However, the rules provided in the Act were made almost inflexible. Meanwhile the 1913 draft had influenced the Polish Acts both of 1926 and 1965 and the Hungarian Ordinance of 1979. The draft of the Institut de droit international of 1908 had a great impact on the Czechoslovak Acts of 1948 and 1963 and the Yugoslav Act of 1982 follows the same approach as the draft of the Institute.

Similar catalogues of presumptions were advocated later on by continental authors such as Nussbaum and Wolff⁵¹¹ in West Germany, Batiffol⁵¹² in France and Schnitzer⁵¹³ in Switzerland, and by "international" lawyers such as Rabel⁵¹⁴. These authors have influenced the modern case law of Germany, Switzerland and other European countries, and the draftsmen of the Rome Convention of 1980.

B. Germany until 1945. — In Germany, since the beginning of this century, the proper law has been determined with the help of a hierarchy of three rules. In the first place the courts sought to ascertain the express or tacit intention of the parties; in the second place they looked for their presumed intention; and in the last resort they relied on the criterion of the place of performance. Whereas in French and perhaps also in English law an intention if not expressed is always presumed, the German courts maintained that in many cases the intention could not be ascertained and that an emergency solution was necessary. Where the presumed intention supplied the test, the German courts hardly ever relied on precisely formulated presumptions. In cases where the centre of gravity was clearly and obviously situated in one country, whether Germany or a foreign country, the presumed intention normally led to the application of the law of that country. In cases where the connections of the contract were equally divided between two or more countries it was difficult to determine upon which criterion the courts relied in their choice between the place of performance and

the presumed intention. The practice of the courts created the impression that this choice was sometimes made arbitrarily and that a solution was often preferred which led to the application of German law⁵¹⁵.

C. *West Germany after 1945*⁵¹⁶. *The presumed intention modern style.* — The hierarchy of the three rules to determine the applicable law — express or tacit intention, presumed intention, and place of performance — was maintained in West Germany after the Second World War. In 1952, however, the West German courts gave the notion of the presumed intention a new look.

“To give effect to the presumed intention [said the Federal Supreme Court], is tantamount to the determination of the law of the contract by ‘objective’ criteria, which means that attention should be paid to the average interests of parties in situations analogous to that before the court and to social considerations without regard to their individual interests⁵¹⁷.”

This approach has led to the creation of some presumptions⁵¹⁸ established by the Federal Supreme Court as well as by the lower courts. It has been held that loans and other contracts with banks are *prima facie* governed by the law of the place where the bank has its office⁵¹⁹. Contracts for the carriage of goods by land are governed by the law of the country in which the carrier conducts his business⁵²⁰. Agreements concerning licences are governed by the law of the place where the licence is exploited by the licensee⁵²¹, commercial agency contracts by the law of the agent’s place of business, etc.⁵²²

This formulation of rules by the Supreme Court based on presumptions clashed with the contention that the determination of the so-called presumed intention of the parties was a question of fact which must be left to the final decision of the lower courts. Nevertheless, the German Federal Supreme Court, like the French Court of Cassation, held so on various occasions⁵²³. In 1965 one of the senates of the Federal Supreme Court criticized that attitude as probably being outdated. In the opinion of the court the task of ascertaining the presumed intention of the parties was no longer a question of discovering the aims and the ideas which the parties might have entertained, but to find the proper law on objective grounds. The law applicable was to be selected with reference to

the connecting elements of the case, and in the weighing of each of these factors the public interest is to be considered⁵²⁴.

The Supreme Court will probably take this approach now that Germany has put into force the rules of the Rome Convention in the fifth part of the law of 25 July 1986 on a New Enactment of the Private International Law, see Article 28. The Act discards any reliance on the presumed intention, see Article 27 (1), and states in Article 28 that the contract shall be governed by the law with which the contract is most closely connected. The German Supreme Court will probably regard it as a question of fact in which country the relevant connecting factors are situated⁵²⁵. However, the question with which country the contract is then most closely connected under Article 28 (1) of the Act will be a question of law upon which the Supreme Court may decide.

D. *The law of the place of performance*. — As was mentioned in 1 (b) above, the application of the law of the place of performance may lead to a splitting of the contract into two parts, each governed by a different system of laws. Although the presumed intention had sometimes been called upon to select one law when a splitting of the contract threatened, the splitting had been endorsed and sometimes even practised by the courts⁵²⁶.

In 1958 the Federal Supreme Court of West Germany applied the doctrine of *renvoi* and accepted a reference back to the *forum* from the law of a foreign place of performance⁵²⁷. The doctrine was applied at least in one other decision of the Federal Supreme Court in 1960⁵²⁸ and also in later decisions by the lower courts⁵²⁹. The Rome Convention has excluded *renvoi*, see Article 15 and section 35 of the new Introductory Code.

E. *Switzerland*⁵³⁰. — The development of the practice of Swiss courts was sketched briefly *supra*, 1 (a) and 2 (b) (iv) (4). From 1906 till 1952 questions concerning the formation of contracts were governed by the law of the place of contracting. For most cases this rule was treated as fixed and mandatory. Questions concerning the effects of the contract were governed by the law which the parties had intended or could be presumed to have intended to apply. If no presumed intention could be ascertained, the courts applied the law of the place of performance which entailed the theoretical possibility of splitting the contract, so that the obligation of each party was governed by a separate law. Thus the possibility of splitting

was accepted and *dépeçage* was practised. Gradually, however, recourse was had more and more to the presumed intention of the parties and the presumed intention was "the intention which reasonable men in the same position would have formed and expressed"⁵³¹.

When in 1952 the Federal Tribunal abandoned *dépeçage* and also stated its opposition to splitting the contract, it made an express declaration in favour of the method which seeks out the centre of gravity⁵³². In later decisions this method was followed by giving preference to the law of the characteristic obligation, thus adopting a formula devised by Adolf Schnitzer⁵³³. The characteristic obligation is that which indicates the economic purpose of the transaction. *Prima facie* the law of the place applies where the person carries on business who performs the obligation that characterizes the contract. In conformity with this principle the courts have established a catalogue of presumptions for various contracts, i.e., for sales the law of the seller⁵³⁴, for leases of movables the law of the lessor, for agency the law of the agent, for insurance the law of the insurer and so on⁵³⁵. However, contracts concerning immovables are *prima facie* governed by the law of the *situs* of the immovable and employment contracts by the law of the place of work⁵³⁶.

In the draft Federal Act on Private International Law of 1982 the principle of the closest connection and the catalogue of presumptions as developed by the courts have been consolidated⁵³⁷. Furthermore, a contract the object of which is to supply a consumer with a performance for his personal or family use is governed by the law of the State where the consumer has his habitual residence when the consumer has been sought out by the supplier in that State⁵³⁸.

F. *The Netherlands*. — The recent Netherlands decisions show that the courts now rely less on the presumed intentions of the parties as the principal test and more on the real and closest connection⁵³⁹. The place of doing business of the party who is to perform the characteristic obligation has grown in importance as a connecting element⁵⁴⁰. Thus the Supreme Court has held that in the absence of a different intention of the parties a contract between a bank and its customer is governed by the law of the business domicile of the bank⁵⁴¹. Furthermore, a series of decisions of a lower court indicate a tendency to adopt the rules of the Hague Conven-

tion of 1955 which the Netherlands has not ratified and to apply as a general rule the law of the seller's place of doing business⁵⁴². A court has also stated that "the centre of the work of a commercial agent is the place where he offers and receives his commissions"⁵⁴³. This trend to establish and apply presumptions is in harmony with the rules of the Rome Convention 1980 which is expected to come into force in the Netherlands⁵⁴⁴.

G. *The Rome Convention 1980*⁵⁴⁵. — Article 4 of the Convention contains the general rule regarding contracts. They shall be governed by the law of the country with which they are most closely connected. To this principle is added a general presumption. In transactions which are not business transactions, the law of the habitual residence of the person performing the characteristic obligation applies *prima facie*. In transactions which are business transactions, the law of the principal place of business of that party is *prima facie* decisive. If the characteristic performance is to be carried out by a subsidiary establishment (branch, agency), the law of the place of that establishment applies *prima facie*, see Article 4 (2).

The general presumption does not govern if the characteristic performance cannot be determined. This will apply to barter contracts, joint ventures, agreements in restraint of trade, etc. Furthermore, the presumption does not govern certain specific contracts:

A contract the subject-matter of which is a right in immovable property or a right to use immovable property is *prima facie* governed by the law of the *situs* of the property (Article 4 (3)). If in a contract for the carriage of goods the country in which, at the time the contract is concluded, the carrier has his place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated it shall be presumed that the contract is most closely connected with that country. Contracts for the carriage of goods include single voyage charter-parties and other contracts the main purpose of which is the carriage of goods (Article 4 (4)). Thus bareboat and time charter-parties are generally not covered by this rule. Here the general presumption applies and the law of the place of business of the shipowner will generally govern the contract. The rule is also subject to the conflict-of-law and substantive-law rules of the international conventions on sea, land, road, rail and air transport.

Individual employment contracts are *prima facie* governed by the law of the country in which the employee habitually carries on his work or, if he does not do that in any one country, by the law of the country in which the place of business through which he was engaged is situated (Article 6).

The convention has one hard-and-fast rule governing consumer contracts (Article 5). Contracts the object of which is the supply of goods and services to a person (the consumer) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object, are governed by the law of the country in which the consumer has his habitual residence if it is entered into in circumstances described in Article 5 (2) whereby the supplier sought out the consumer in his country, see *supra*, 2 (c) (iii) (6). Article 5 on consumer contracts does not apply to contracts for carriage except package tours. Nor does it apply to contracts for the supply of services to the consumer exclusively in a country other than that in which he has his habitual residence. It does, however, apply to package tours whether they begin in the country of the consumer or not.

The *prima facie* rules provided in Articles 4 and 6 are to be regarded as presumptions of some strength. They apply unless "it appears from the circumstances as a whole that the contract is more closely connected with another country", see Articles 4 (5) and 6 (2). This is pointed out in the Report which states that

"the flexibility of the general principle established by Article 4 (1) on the law of the closest connection is substantially modified by the presumptions in the following paragraphs⁵⁴⁶".

However, it was not intended to create *quasi*-inflexible rules as those provided in the Austrian Federal Act of 1978 and in the 1985 Hague Sales Convention, Article 8.

H. *The Socialist countries of Eastern Europe*⁵⁴⁷. — Following the Rolin draft, mentioned *supra* (2) A, adopted by the Institut de droit international in 1908 the Czechoslovak Act of 11 March 1948 on Private International Law opted for the application of the law which was most suitable for a reasonable regulation of the legal relationship in question (i.e., the law of the most real connection). To this centre-of-gravity approach the Act added a catalogue of presumptions covering the most important types of contract.

These rules have been retained by the new Act of 4 December 1963 on Private International Law (Article 10, paragraph 1). As in the former law a number of presumptions concerning bilateral contracts result in the application of the law on the domicile of the party performing the characteristic obligation. This applies to contracts for the sale of movables, *locatio conductio operis*, transport contracts, insurance contracts, and agency (Article 10, paragraph 2). Contracts concerning immovables are, however, governed by the law of the *situs* of the immovable.

Contracts which are not mentioned in this catalogue are governed by the law of the common domicile of the parties. When they do not have a common domicile the law of the place of contracting governs if the contract was made *inter presentes*. If the contract was concluded *inter absentes* the law of the domicile of the offeree governs⁵⁴⁸.

Labour contracts are not governed by the centre-of-gravity rule. Here a number of specialized, but fixed, conflict rules apply to various typical situations, the most important of which sanctions the application of the law of the place of work (see Article 16).

The Albanian Act of 21 November 1964⁵⁴⁹ on the Civil Rights of Foreigners and the Application of Foreign Law contains provisions very similar to those of the Czechoslovak Act. Article 18 on contracts in general and Article 20 on labour contracts are almost identical with the Czechoslovak provisions.

The approach of the Yugoslav Act on Private International Law of 1982 is similar to that of the Czechoslovak Act although it is differently expressed⁵⁵⁰. Article 20 of the Act contains a catalogue of rules which apply unless "special circumstances of the case refer it to another law". Many of the rules rely on the law of the party which is to effect the performance which is characteristic of the contract. This applies, *inter alia*, to sales of movables, construction contracts, agency and other contracts of representation, money loans, bank guarantees, bailments, carriage of goods and persons and insurance. However, copyright contracts are governed by the law of the author, and contracts for the transfer of technology by the law of the receiving party. As in the Czechoslovak Act labour contracts are governed by the law of the place of work, and contracts regarding immovables by the law of the *situs*. Contracts which are not covered by the catalogue are governed by the law of the offeror. Article 6 (2) provides for *renvoi*.

The practice of the Foreign Trade Arbitration Commissions of Bulgaria and Romania leave a somewhat blurred picture. The Romanian Arbitration Commission relies mostly on the law of the place of contracting, which is the most important connecting factor even in contracts made *inter absentes*⁵⁵¹. The Bulgarian Arbitration Commission has in general held the law of the place of performance of the seller to be applicable⁵⁵².

(iii) *The United States*

Survey. — In the United States several methods have been applied. Until the late 1960s a system of inflexible rules had been followed by the courts of many states. A rigid application of the law of the place of contracting and the law of the place of performance was sponsored by the Restatement of the Conflict of Laws of 1934. However, both before and after the Restatement (1934) a number of courts applied more flexible methods. Thus the presumed intention of the parties was relied upon by the courts of some states. After the Second World War more flexible methods have gained ground. The test of the “most significant relationship” and the methods advanced by Currie, Cavers and other authors⁵⁵³ whereby the policies behind the conflicting substantive rules are considered have found favour. These flexible methods are reflected in the Restatement Second of the Conflict of Laws of 1971. At present (1986) the rules of the conflict of laws of contracts in the United States are in disarray and neither a set of uniform rules nor at least a uniform method has emerged as yet.

(1) *The main trend until 1971*

Before the publication of the Restatement 2d (1971) the majority of courts applied the law of the place of contracting or the law of the place of performance. In doing so they acted under the influence of the Dutch writers of the seventeenth century, in particular Huber and Voet, of the English cases and of American authors such as Kent, Story and Beale who all adhered to the principle of territoriality. This main trend is made up of two variants: some decisions following Story applied either the law of the place of contracting or the law of the place of performance to the contract. Commonly the intention of the parties, actual or presumed, was found to support the choice of one or the other of these laws. Other decisions followed the theories of Justice Hunt in *Scudder v. Union National*

*Bank of Chicago*⁵⁵⁴, and later on of Beale; they split the contractual problems into two parts: the formation, the interpretation and the validity of the contract were governed by the law of the place of contracting; the performance of the contract was governed by the law of the place of performance. This approach was followed by the Restatement (1934)⁵⁵⁵ of which Beale was the reporter.

In the period before the publication of the Restatement in 1934 the first variant was adopted in the majority of cases. Afterwards decisions agreeing with the second variant became more numerous. Of about 150 American decisions dating from the period 1945-1962 which were examined by the present writer more than half clearly followed the rules of the Restatement (1934) and nearly half of the decisions cited Beale or the Restatement (1934). Among the rest of these cases some clearly followed Story and applied one legal system to the contract as a whole. Some of those decisions, however, which followed the Restatement (1934) were compatible with the theory of Story as well and some cited him together with the Restatement (1934) or with Beale.

Among the minority of cases that did not clearly follow the main trend in either of its variants a few did not reveal the grounds upon which they were decided. One-fourth or one-fifth of the cases clearly deviated from the main trend and these often posed real conflict problems because the conflicting laws differed on the point in issue. The deviations did not always follow state lines.

Among the deviations from the main trend figure those cases that paid lip service to the traditional rules but which in fact followed other principles than the principle of territoriality of laws⁵⁵⁶.

(2) Deviations before 1971

A. *Law of validation. Consideration, Statute of Frauds.* — A validating tendency occurs in cases concerning lack of consideration and oral agreements.

In *Scudder v. Union Bank of Chicago* the respondent Scudder had promised to honour a bill of exchange which the plaintiff intended to draw upon him. The promise which was made orally was given in Illinois, the bill was payable in Missouri. Under the law of Missouri the oral promise was not binding, by the law of Illinois it was binding. In a passage which has become famous Justice Hunt said: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place

where the contract is made⁵⁵⁷." As the question before the court turned upon the execution of the promise which had been given in Illinois the contract was held to be valid. Sixteen years later the same issue came before the same court in *Hall v. Cordell*; this time, however, the connecting factors were reversed; the promise was made in Missouri and the draft was payable in Illinois. Speaking for the court Justice Harlan said: "Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance"⁵⁵⁸ and thus the oral promise was upheld.

This glaring contradiction, as Beale called it⁵⁵⁹, showed how covert techniques were being used to uphold interstate transactions in order to save *bona fide* contracts from invalidity. As was pointed out by Ehrenzweig, contracts have been upheld quite generally when they satisfied the formal requirements of either the *lex fori* or the law of another state, provided that the state of the validating law had sufficient contacts with the transaction to justify the application of its laws⁵⁶⁰. The technique of pointing to the law attached to that connecting factor — be it the place of contracting, the place of performance or some other contact — which could save the contract on the ground that it constituted the constantly used sole connecting factor was not infrequently applied. Later, however, the courts tended to become more candid. Thus in *Kossick v. United Fruit Co.*, Justice Harlan of the Supreme Court of the United States said on a question concerning the validity of an oral promise:

"Turning to the present case . . . it must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability . . . by virtue of the authority of the State or Federal Government. This fact in itself creates some presumption in favour of applying that law tending toward the validation of the alleged contracts⁵⁶¹."

The Restatement 2d (1971) now provides a rule of validation. Formalities are governed by the law applicable to issues in contract; in addition, formalities which meet the requirements of the place where the parties execute the contract will usually be acceptable (section 199).

B. *Usury cases*. — It is disputed whether a similar validating tendency is to be found in the numerous conflicts cases on usury

provoked by the existing differences between the state legislations on the permissible maximum interest on money loans or on the consequences of excess charges of interest. Some writers⁵⁶² have discerned in them a rule of validation. They find support in decisions of the United States Supreme Court⁵⁶³, the most recent of which dates from 1927. In that year, in *Seeman v. Philadelphia Warehouse Co.* the court held that a loan granted by a Philadelphia corporation to a New York businessman who pledged property in New York as security was valid in accordance with the law of Pennsylvania although it would have been void if the usury statute of New York had applied. The court stated that it would support a policy of upholding contractual obligations assumed in good faith. By stressing the need of good faith the court wished to indicate that it would not tolerate an

“evasion or avoidance at will of the usury law otherwise applicable, by the parties entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject⁵⁶⁴”.

The court thus expressed the view that a contract which is invalid according to the law which is otherwise applicable will be upheld if valid by the law of one of the states with which the transaction had “normal relation”. The same principle was expressed in several later decisions of other courts⁵⁶⁵ and, as will be shown, by the authors of the Restatement 2d (1971).

However, in his careful analysis of American cases Batiffol⁵⁶⁶ was able to demonstrate (1938) that less than a quarter of all usury cases had adopted the law of validation and Ehrenzweig (1962), Weintraub (1961) and Westen (1967)⁵⁶⁷ also contested the general acceptance of a rule of validation in the American case law. Ehrenzweig contends that the usury cases represent the most important example of the absence of a rule of validation. The multitude of American cases, however, does not show a clear picture. In a substantial number of cases the American courts have treated a transaction as invalid if it was invalid by the law of the *lex fori*⁵⁶⁸. Many of these cases involved weak party contracts made between a money lending enterprise and a private individual, who was domiciled in the *forum* state which had enacted a small loan statute protecting the debtor against usurious interest rates.

Westen and Ehrenzweig maintain that validating decisions have been rendered in those cases where both parties were incorporated business enterprises or the borrower was an "experienced individual" and where, therefore, inequality of bargaining power was absent. In several of these cases the permissible rate of interest of the statute upholding the transaction — or the rate charged — was not greatly in excess of the rate allowed by the otherwise applicable law⁵⁶⁹.

The Restatement 2d (1971), section 203, now supports the rule laid down in *Seeman v. Philadelphia Warehouse Co.* (*supra*, note 564) subject to some qualifications: 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 with 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.

C. *Insurance cases.* — A group of cases in which also lip service was paid to the traditional rules, but where other considerations governed, was that involving the numerous *life insurance* claims. In these cases the courts, using various methods found that the place of contracting was the place where the insured party was domiciled⁵⁷⁰. This hidden application of the law of the domicile served to protect the insured party whenever the rules of the law of his domicile gave him a better protection against the insurance company than the rules in the law of the business seat of the company which the company had often specified as the place of contracting, relying upon the general rule of the common law⁵⁷¹.

D. *The test of the centre of gravity.* — An openly admitted deviation from the main trend was the adoption of the so-called centre-of-gravity method, first practised by the federal courts and the courts of New York state⁵⁷². By this method the courts searched for the state or the country having the closest factual relationship with the subject-matter. However, the decisions did not indicate uniformly whether regard must be paid to the most significant relationship of the contract with a particular state or country or to the preponderance of interest by a state or country in the individual issue involved⁵⁷³.

Some cases concentrated on the relationship of the contract with a country as did the draft to the Restatement 2d (1960) although

it did not produce a categorical statement⁵⁷⁴. Other decisions emphasized the relationship of the issue with a particular country. In *Auten v. Auten*, one of the leading cases, the New York Court of Appeals said that the method of grouping-of-contacts or of pin-pointing the centre of gravity permits the courts to give effect to the consideration whether one rule or the other will procure the best practical result. The court also said that this method enables the court to attribute to the country with the greatest interest in the problem paramount control over the legal issues arising from a particular set of facts and permits the *forum* to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation⁵⁷⁵.

This new trend was inspired by a number of writers among whom Cook and Harper should be mentioned⁵⁷⁶. Authors who laid particular stress on the significance of the issue involved were Cavers and Currie⁵⁷⁷. These two authors⁵⁷⁸ advocated methods to be applied by the courts when solving conflicts cases in general and not only cases concerning the conflicts of laws respecting contracts.

E. *Cavers and Currie*. — In 1933 Cavers showed that the courts of the United States had not allowed the elements of contact alone to determine the law applicable⁵⁷⁹. Very often they considered the results which the application of the various laws would produce. A certain connecting factor was employed because it gave the court the opportunity to apply the law of the state or country to which it pointed, but this was not in fact an automatic application of a choice-of-law rule. The courts often found that by a happy coincidence the established conflicts rule promoted justice, but when, in their opinion, it did not, they established another in its place. They pretended to ask the question: which is the decisive connecting factor? However, they were aware of the fact that the real question for consideration was different.

Cavers approved of the results of the decisions reached by the American courts, but disapproved of their distortion of reality. In his opinion the outcome of each case should turn upon a scrutiny of the events of the transaction giving rise to the issue and on a careful comparison of the results that might be reached under foreign law with those that the law of the *forum* would produce in the particular case. The court should appraise the significance of the connecting factors in the light of the competing substantive rules. Cavers was inclined to allow the court more liberty to decide a case

on its actual merits than previous writers had done, but he did not recommend an approach which abandoned principle and precedent. He wanted the court to take into consideration whether it was expedient to establish a particular solution as a rule of law. Such rules might be framed as rules for solving conflicts between substantive rules of certain jurisdictions and – sometimes – as general rules governing certain issues such as the rule of validation in cases concerning usury.

In his later writings Cavers established, by way of example, two rules of preference governing contractual matters. One was a rule protecting the weak party against the adverse consequence of an unequal bargaining power when such protection was offered by a law having a specified connection with the transaction⁵⁸⁰, and the other a rule affirming the principle of party autonomy for other cases⁵⁸¹. In doing so Cavers disavowed a result-selective approach which would disregard the significance of the connecting factors and simply choose the substantive rule that best accords with today's ideas of justice and convenience. However, the principles of preference he proposes are to be based upon some – as he hopes – universally recognized value judgments⁵⁸².

Several authors such as Cheatham and Reese, Leflar and Weintraub have emphasized that among choice-influencing factors a court should be allowed to take into consideration that rule of a particular system of laws among several which may be applicable which is “in tune with the times”⁵⁸³ or, as Leflar has it, “the better rule of the law”⁵⁸⁴.

Common law courts, Leflar argues, have always, when they had to choose between two competing rules of law proposed for application to a given case, tried to choose the sounder rule. They have done this openly when the competing rules were urged within a single jurisdiction. This is not a “free law” jurisprudence; it is the common law tradition. The only new idea that is proposed is that it is permissible to do the same thing in choice-of-law cases⁵⁸⁵. Although by 1986 several courts had in fact followed this approach only a minority of them had openly adhered to it⁵⁸⁶.

Currie's theory has had several followers among writers and some among the American courts⁵⁸⁷. The theory briefly stated is based on three cornerstones, the existence of true conflicts, on governmental interests and on the preponderance of the *lex fori*.

Currie was chiefly interested in what he called true conflicts.

They occur when the laws of two or more states are potentially applicable to the subject-matter, and each of them has a governmental interest in the application of its laws. This interest is to be ascertained through an enquiry into the policies of the laws of the respective states. By the ordinary process of construction and interpretation of the competing law rules the court must ascertain whether the purpose of each of these laws is advanced by its application in the case. There is a false conflict if one of two states — whether the state of the *forum* or a foreign state — has a governmental interest and the other has none. Then the law of the interested state applies⁵⁸⁸.

A true conflict arises when two or more states have a domestic policy that would be advanced by its application to the case and these policies clash. In such cases Currie would let the law of the *forum* govern. This applies to the usual case where there is a conflict between the law of the *forum* and some foreign law or laws. It also applies to the more unusual case where the law of the *forum* is disinterested and the conflict arises between the laws of foreign states⁵⁸⁹.

Currie admitted that his theory would lead to different solutions of the same problem depending on where the action was brought. If with respect to a particular problem this appears to be a serious infringement of a strong national interest in uniformity of decision, the court should not sacrifice the legitimate interest of its own state but should leave it to the Congress of the United States to use its constitutional power to solve the problem through legislation.

In solving the true conflicts von Mehren and Trautman are, as was Currie, concerned about finding the state interests behind the substantive rules or, as they term it, to apply the rule of the jurisdiction predominantly concerned. They do not seem to give the same priority to the law of the *forum* state as did Currie and they are more interested in what they call multijurisdictional considerations for the solution of cases where two jurisdictions are equally concerned about the issue⁵⁹⁰.

(3) *The Restatement 2d (1971)*

The approach of the American Law Institute in the Restatement 2d (1971) is very different from that in the Restatement (1934). The rigid rules have been replaced by flexible standards. In the case of contracts the Institute has chosen a compromise between reli-

ance on the centre-of-gravity theory proposed by the 1960 draft of the Restatement 2d (1971) and the methods advocated by Cavers, Currie, Leflar, von Mehren and Trautman, Weintraub and other protagonists of a policy-centred approach.

Restatement 2d (1971), section 6, which lays down general principles determining a choice of law, also supplies the standards applicable to contracts⁵⁹¹.

Section 188 on the law governing in the absence of an effective choice of law by the parties provides in subsection (1) that the rights and duties 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 section 6.

According to section 188 (2) the contacts to be taken into consideration in applying the principles of paragraph 6 to determine the law applicable to an issue include the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject-matter of the contract, 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.

So far the particular issue is the primary concern. Beginning with section 188 (3), however, a shift of emphasis seems to occur: if the place of negotiation and the place of performance are located in the same state the law of this state will generally apply unless otherwise provided in the following title B on particular contract⁵⁹². Title B (sections 189-197) contains a number of presumptions. Most of these are formulated as section 191 on Contracts to Sell Interests in Chattel which runs as follows:

“The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in section 6 to the transaction and the parties, in which event the local law of the other state will be applied.”

Here, as in the other sections of title B, the contract as such is

the main object of regulation. The law of the place of delivery governs both the validity of the contract and the rights and duties of the parties unless the contract discloses a more significant relationship with another state with respect to the particular issue.

In the following title C dealing with particular problems it appears that most of these issues mentioned are to be governed by the law that has the most significant connection with the contract. The comment states expressly that the rules of title B which depend upon the type of contract provide a satisfactory basis for determining many of the questions that arise in contract, because most of them will usually be governed by a single law. On occasion, however, it is said, an approach directed to the particular problem, rather than to the type of contract involved, will provide a more helpful basis for the determination of a problem of choice of law⁵⁹³. In the sections of title C most questions are determined by reference to the general rules set out in title B. Some special rules determine the law regarding capacity, formalities, and usury, and these rules are validating rules supplementary to the general rules of contract.

(4) *The state of the law in 1986*

A. *By 1986 the law had developed as follows*⁵⁹⁴. — Headed by the states of California⁵⁹⁵, New York⁵⁹⁶ and Pennsylvania about half of the states⁵⁹⁷ had given up the classical formulas and so had the District of Columbia⁵⁹⁸, Puerto Rico⁵⁹⁹, and the federal courts in international maritime cases. Most of them had adopted the approach of the Restatement 2d⁶⁰⁰, some the result-selective method⁶⁰¹ and some the governmental interest analysis put forward by Currie⁶⁰².

Some insurance cases, some usury cases and most cases concerning formalities were decided as they had been decided before 1971. However, the new methods enabled the courts of some states to set out the reasons for their conclusions more rationally⁶⁰³.

In a great number of states the courts have continued to follow the old tests⁶⁰⁴.

However, the outline of a new development now seems visible. The old rules are being abandoned. What happened first in New York, Pennsylvania and California will probably happen sooner or later also in the other states. It remains though to be seen to what

extent the method adopted by the Restatement 2d (1971) will be followed, and how the rules of the Restatement will be interpreted. Will the courts adhere to a centre-of-gravity method which enables them to rely mainly on the relevant connecting factors and on the established presumptions or will the courts look behind the connecting factors⁶⁰⁵ for the underlying policies and governmental interests?⁶⁰⁶ The latter attitude which is supported by influential writers such as Cavers, Currie, Leflar, von Mehren, Trautman and Weintraub is gaining ground⁶⁰⁷.

Many decisions, irrespective of whether they employ the classical formula or follow the new types of approach, disclose the homeward trend. As it has done earlier the United States Supreme Court may still set limits to the most extreme trend to rely on the *lex fori*⁶⁰⁸, but since 1941 its policy has been not to interfere with the substance of the conflict rules of the states⁶⁰⁹. The homeward trend of the American courts has hitherto not been as marked as that shown by many European courts, but it has been clearly noticeable⁶¹⁰. This fact and the chaotic picture which American case law displays in this and other fields have encouraged some authors such as Currie⁶¹¹ and Ehrenzweig⁶¹² to call for the application of the *lex fori* as a basic rule, and Restatement 2d (1971), section 6, which has opened the way for several choice-influencing considerations also suggests that the relevant policies of the *forum* should be taken into account. As will be seen the Uniform Commercial Code has prescribed a moderate and flexible return to the *lex fori*.

B. *The Uniform Commercial Code*. — If, instead of enacting the Rome Convention, the legislature in England, France or Germany had laid down that the *lex fori* were to be applied whenever the contract “bears an appropriate relation” to the *forum* country, the treatment of cases involving a conflict of laws would not have suffered a great change. Such a flexible preference for the *lex fori* figures in the American Uniform Commercial Code section 1-105. In the absence of an agreement by the parties on the law applicable, “this Act [i.e., the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state”⁶¹³.

From the text and from the comments it seems to follow that the Code may also apply to contracts with foreign countries. The Uniform Commercial Code will, in fact, govern a substantial part of the foreign trade of each of the United States. It will, for instance,

apply to international sales. The fact that all but one state of the Union has enacted the Code will probably raise problems connected with the territorial application of the Code more often in international than in interstate trade. Interstate conflicts may arise whenever a state has enacted modifications of the Official Text as published by the American Law Institute. When promulgated as a statute in a state "this Act" in the sense of section 1-105 will mean the Uniform Commercial Code as enacted by that state. Every state having enacted the Code will therefore apply its own version of it whenever the transaction bears an appropriate relation to that state.

The present rule in section 1-105 (1) leaves the court considerable freedom to decide when such an "appropriate relation" exists that makes the Uniform Commercial Code applicable. However, an appropriate relation is more than a "reasonable relation", and the connection with the country of the *forum* must presumably be stronger than the connection with the country or state the law of which is chosen by the parties. It is to be expected that a connecting factor or a grouping of connecting factors that have previously led the courts seized of a case to apply the law of the foreign country to which they pointed, will lead this court to apply the Code when the same factor or factors point to the *forum*. The Official Comment, however, encourages the court to go further when it claims that the application of the Code is

"justified by its comprehensiveness and by the fact that it is in large parts a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries⁶¹⁴".

On the other hand, according to the Official Comment a contract should not be governed by the Code if the law of the place of contracting and the law of the place of performance coincide and are contrary to the *lex fori*⁶¹⁵. This seems to indicate that the existence of a place of business of one of the parties in the state of the *forum* does not constitute *per se* an appropriate relation which will make the Code applicable.

The Uniform Commercial Code (UCC), section 1-105, is a unilateral conflict rule. It only indicates when the Code is applicable and does not provide any guidance for cases where the Code is not applicable. Hence the general conflict rules will operate, and the rules of the Restatement 2d (1971) may exercise their influence.

Section 1-105 has not radically changed the American principles of the conflict of laws in matters of contract. As mentioned before, the homeward trend is noticeable in American interstate as well as international conflicts. Section 1-105 only applies to some transactions. Most types of contracts are governed by other rules. Furthermore the Code does not regulate all types of contracts and all aspects of the law of contracts. If the Code had changed the law radically, related contracts such as sales which are covered by the Uniform Commercial Code, and leases which are not, would be governed by different conflict rules, and aspects of the law of contract, such as misrepresentation and mistake would not be governed by the conflicts rules of the Code even if all other aspects of the case are governed by them. The cases reported hitherto, in which reference is made to section 1-105 seem to confirm that no great change has taken place⁶¹⁶.

(c) *Comparison and critique of methods and rules*

The Babel. — The survey given above of the solutions adopted in the various legal systems discloses a state of confusion. The methods and rules differ not only between the various states of the world, but sometimes also within the same country. Very different techniques exist among countries of the same political and economic structure. The rigid rule in Soviet Russia contrasts with the flexible rules of Czechoslovakia. Inside the United States flexibility and inflexibility still exist side by side in neighbouring states. The theory that conflicts rules reflect the economic and social structure of a country is not confirmed by the rules on the conflict of laws of contracts. These rules have hitherto been the creatures of human imagination more than of economic necessity. Old and barely traceable traditions, the philosophies of those writers who in past centuries have provided the inspiration, and the accident of those court decisions which have been considered the leading cases all account for the present Babel. Only the homeward trend is common to all countries and even this trend varies in intensity from country to country and from case to case.

Seen from outside the confusion seems unjustified. It is to be hoped that in the future the need to obtain predictable and uniform results will increase the efforts to elaborate multilateral rules which are as commonly accepted as is the freedom of the parties to select

the applicable law in the commercial contracts of international trade.

The following sections will be devoted to a comparison and critique of the methods and rules.

(i) *Universalism or particularism*⁶¹⁷

(1) *Introduction*

In Chapter I 2 (b) above the universalist attitude was contrasted with the particularist. The former desires uniformity of result regardless of which country or state assumes jurisdiction. The latter would permit each country to frame its own conflict rules. In general, the *lex fori* should govern the matter. In some cases, however, multilateral rules should apply which enable foreign law to play some part. The primary concern of the particularist approach is that the rules should suit the relevant policies and the traditions of the *forum*⁶¹⁸.

In the following these two attitudes will be considered.

(2) *Lex fori seldom applies to foreign domestic and foreign international contracts*

Few writers have pleaded for the application of the law of the *forum* to contracts, all the connecting factors of which are located in one foreign country. The courts have, in general, only applied the *lex fori* to such *foreign domestic* contracts when the public policy of the *forum* was involved or when satisfactory evidence of the foreign law applicable could not be produced. Disputes arising out of domestic contracts are, in general, only litigated abroad either because the defendant has transferred his residence or his business to the country of the *forum* after the conclusion of the contract or because the plaintiff has found an opportunity of taking advantage of a *forum* the law of which he believes to be favourable to him. Most authors and most courts have realized that to apply the *lex fori* would be to defeat the expectations of the parties who have adapted their contract to the requirements of the foreign law.

Writers have not either pleaded very often for the application of the *lex fori* to those contracts which, although of an international character, lack local contracts with the country of the *forum*⁶¹⁹

and the courts have not often applied the law of the *forum* to such foreign international contracts. In these cases the reasons for bringing an action in a particular country are often the same as in the case of a foreign domestic contract. Although the parties may not have entertained any common expectation that a certain system of laws would apply, they did not adapt their conduct to the requirements of the *lex fori*, and the application of the law of a country with which the contract had a closer connection will probably disappoint them less than will the application of the law of the *forum*.

(3) *The area of the lex fori. International contracts connected with the forum.*

The expectations of the parties cannot be advanced with the same strength in favour of the application of foreign law as far as those contracts are concerned which have appropriate connections both with the country of the *forum* and with other countries. These are the contracts for which the particularists advocate the application of the *lex fori* and, one must admit, for these contracts the arguments in favour of applying the *lex fori* assert themselves forcibly: it is often difficult and time-consuming to obtain evidence of the contents of foreign law. This difficulty increases when the foreign law is uncertain, when for instance its relevant case law is obscure or contradictory. Furthermore, foreign law is never applied in its entirety. The foreign law of procedure and parts of foreign public law are not applied even when they are intimately connected with the rules of private law which are applied, and this on occasion may lead to unhappy results.

In addition to these tangible arguments in favour of the *lex fori* the courts are often guided by their sentiment. They tend to feel that the application of their own law is generally supported by reasons of justice and expediency.

Though the conflict rules of most countries have been formulated as multilateral rules, foreign law has very often been unable to compete with the *lex fori*. It is doubtful whether the present multilateral conflict rules speaking the language of equality are a realistic expression of the law as applied by the courts. The American UCC, section 1-105, which permits the application of the law of the *forum* whenever the transaction bears an appropriate relation to the state of the *forum* perhaps expresses the case law better than any multilateral rules.

However, a weighty objection to this return to the *lex fori* is that it leads to unpredictable results. The applicable law can be predicted only when it can be foreseen where the litigation will take place, and in international contracts the *forum* is frequently unpredictable. When the parties reside in different countries it will, in general, depend upon which of the parties will bring the action, and this again often depends upon the nature of their dispute and on whether it arose before or after delivery or payment.

In general the *forum* will be in the defendant's country, but when another country exercises concurrent jurisdiction the plaintiff may bring an action there if the law of this country gives him a more favourable position than does the law of the country of the defendant. This unhappy occurrence, known as "forum shopping" is the consequence of the existing tendency to accord first place to the *lex fori*.

It may be argued that the parties by way of a party reference may select the applicable law and thus provide certainty themselves. In some cases, however, the parties do not want to touch on the question of the applicable law when they negotiate the contract. In other cases they overlook it. Whatever the reasons for the absence of a party reference may be, the conflict rules should supply the parties with a predictable answer and should not expose them to the operation of the substantive law of a tribunal which cannot be known in advance.

(4) *Uniform or particular conflict rules*

The particularists do not plead for the application of the law of the *forum* in all cases⁶²⁰. They admit multilateral rules to be applied in some cases such as those involving foreign contracts of the type mentioned in (2) above. They argue, however, that each country must have the opportunity to frame its own conflict rules in accordance with its own relevant policies. In fact, the legal systems of the world seem to have followed the particularists. Even to the extent that multilateral conflict rules exist and are applied loyally by the courts, these rules differ from each other. It has not been possible to achieve uniform rules in statutes or concerted practices among the national courts.

However, there are few persuasive arguments to restrain the legal systems of the world from striving towards uniformity. The policies

behind the substantive rules respecting most issues in contract do not differ so much that it would be impossible to achieve a considerable measure of uniformity. The types of contracts are basically the same everywhere and serve the same purposes. These common policies will make it possible to agree on uniform conflict rules. A particular application in space of a substantive rule of contract law is mostly not warranted by any fundamental policy of the enacting country. This may be said to be confirmed by the widespread recognition of party autonomy in the legal systems of the world. If the conflict rules concerning contracts had been based upon differing fundamental policies, then a recognition of the parties' choice of law could not have been achieved. Instead, courts in most parts of the world have been willing to jettison any other conflict rules whenever the parties showed preference for a certain law. They did it primarily to ensure predictability and this would indicate that predictability is more important than many of the policies that may lie behind the conflict rules which would be applicable otherwise.

However, in respect of some contracts certain countries can point to policies of their own. A growing number of countries seek to protect the supposedly weak party to a contract. The protecting countries may wish to extend this protection to their citizens or residents at home, also when entering into international transactions, and thus they wish to establish certain conflict rules of their own. However, in a world of growing integration there will also be a growing need for a mutual regard for each other's social policies, and it should not be impossible to agree on the uniform conflict rules which ensure for protective statutes a reasonable sphere of application. There is already agreement as to the application of some common conflicts rules in areas where autonomy is not always recognized. Thus it is generally agreed that the *lex rei sitae* governs contracts concerning the transfer of an interest in immovables and that the law of the place of work applies to most contracts of employment. There is a growing understanding of the application of the law of the habitual residence of the consumer in contracts for the supply of goods and services to consumers.

A divergence between the conception of how the choice of law rules respecting contracts should be framed exists between the North and the South, i.e., between the industrialized countries notably those which support a market economy, and the countries of development. The latter advocate application of the law of the

“buyer”, be it the buyer of goods, know-how, services or credit facilities, whereas the former favour the law of the “seller”⁶²¹. The South envisages itself as the buyer. It sees the North as the seller and wishes to apply its own laws in order to protect the weak domestic party against the stronger party from the North and to safeguard its governmental interest in regulating international contracts. This divergence has caused much uncertainty in the North-South trade relationships, and has only confirmed how desirable uniformity is. It seems to be the main concern of the developing countries to have their economic legislation apply to contracts which affect their foreign exchange reserves or which have other effects upon the national economy. Their concern will be taken care of by uniform conflict rules which give effect to the public law rules of a country closely connected with the contract, see *infra* under 4 (c) (iii).

Furthermore, some special considerations may still govern trade between the Socialist countries owing to peculiarities of the Socialist law of contract and Socialist trade technique. However, in commercial intercourse between the Socialist and the Non-Socialist world a common ideology has been noticeable not only in the substantive rules but also in the conflict of laws of contracts.

The rapid growth of international trade in the last decades has made the need for uniformity more urgent than ever before. Courts and legislatures are in fact slowly becoming aware of this need. In the East as well as in the West several attempts have been made to establish common principles of commercial law, a *lex mercatoria* for international trade. The conflict rules respecting contracts may become an important part of this new law merchant⁶²².

(ii) *Rigid rules or flexible standards*

Legal Rule versus Dynamic Equity. — As was shown *supra*, (b), the laws of the world can furnish examples both of individual inflexible rules, notably that which requires the application of the law of the place of contracting, and of more flexible methods such as those advocated by Cavers and Currie. In countries which plan to reform the conflict of laws of contracts the legislatures or the courts are faced with a difficult dilemma: is a method to be adopted which ensures justice in the individual case, but which will abandon to a greater or lesser degree the quest for predictable solutions? Or are

rules to be introduced which pay regard to the need for foreseeability but which, if applied consistently, will sometimes cause hardship in the individual case?

The more rigid the rules are, the more frequent the clash between law and equity will be. This is a serious objection to rigid solutions. The modern judge is probably more aware of the individual concerns of the parties than were his predecessors. For him predictability will often carry little weight when confronted with his notion of equity and fairness. An excessively remorseless rigidity should be avoided.

On the other hand the choice-of-law process should not focus on litigated cases only. The contracts producing hard cases are more apt to be taken to court than are the contracts which take their course in accordance with the rules. When reported and discussed the litigated contracts are more likely to attract attention in those circles where the law in making is being debated than is the unnoticed majority of contracts where the rules work smoothly and which therefore pass without comment. A court dispensing justice in a hard case seldom intends to give directives for future conduct, but in several countries decided cases are the major source of the law and what is believed to have been the *ratio decidendi* will become a rule, even if this was not intended. The conflict rules respecting contracts are needed first of all by the parties who wish to be guided by the law when making and performing their contract. This need for certainty is a very important consideration.

The question is, however, whether rigid rules can bring about the desired certainty and foreseeability, and if so whether in the long run this will be worth the effort.

At present the legislature of one country cannot alone bring about the high degree of certainty and predictability which the parties need. This is due to the existing diversity among the nations of the conflict rules respecting contracts and to the existing possibilities for bringing an action upon an international contract in more than one country. Only a convention on conflict rules which is adopted by a large number of countries can achieve a substantial degree of predictability.

However, in the long run a convention introducing rigid and uniform conflict rules on contracts may not be worth the effort. At present the substantive law of contract is in a rapid stage of evolution in many countries, and so are the patterns of international

trade. The conflict rules will probably be affected by these developments, and rigid rules cannot give effect to them. Standards of some flexibility will be able better to meet the changing conditions. They will not arrest the dynamic element in adjudication.

(1) Rigid rules

A. *The rigid rule and the catalogue of rigid rules.* — The American case law, discussed in (b) (iii) above, demonstrates that frequently a rigid application of the law of the place of contracting leads to unsatisfactory solutions and that this rule is therefore more and more abandoned. The American experience is instructive. In the United States numerous conflicts cases have been reported, and this comprehensive case material shows better than the modest number of published cases from the Soviet Union and other countries which apply a rigid rule that an inflexible application of the *lex loci contractus* cannot be maintained.

The same lesson, it is submitted, will be learned from a rigid application of the *lex loci solutionis*. To some extent this is also demonstrated by the American case law. A corresponding application of the law of the place of business or the law of the domicile of the debtor has not been attempted anywhere, but it would probably not produce better results than the rigid application of the *lex loci solutionis*. As will be shown below, the weight attached to each of these connecting factors varies from one type of contracts to another.

Realizing that one of the serious flaws of relying on a single rigid rule is that it does not fit some types of contracts, some legal systems have adopted a catalogue of fixed rules. For each particular type of contract one particular connecting factor fixes the applicable law. Poland, East Germany, Spain and Hungary have adhered to this approach. It is supported by the fact that the centre of gravity of some types of contracts is designated by one particular connecting factor. Injustice in the individual case will therefore occur less frequently than if the same connecting factor is applied to all types of contracts. At the same time the predictability ensured by such rules is practically the same.

However, as was mentioned above, no single country can achieve foreseeability by such rules of its own. Furthermore, the connecting factor designated by the particular rule will not always be able to

pinpoint the real centre of gravity of the transaction. Rigid particular rules will sometimes lead to inequitable results, and to apply them strictly cannot be justified in such circumstances by the consideration that a high degree of foreseeability is obtained. No country alone should adhere to inflexible rules.

As mentioned above a higher degree of predictability might be achieved by way of international conventions. But even the fixed rules established by conventions might operate too harshly. The rigid rules of the Hague Convention of 1955 on the Law Applicable to International Sales of Goods have been criticized for being too inflexible and not apt to meet the varying demands of the international trade⁶²³. In the Hague Convention of 1985 the few rigid rules of the 1955 Convention were replaced by somewhat more detailed rules which were made *quasi inflexible*.

B. *A catalogue of quasi-inflexible rules.* — This approach rests almost on the same considerations as those which have led to a catalogue of fixed rules. In order to provide predictability for the parties and to save them from litigation exceptions from the rules should be made only in the very rare situations where the impropriety of the rules provided in the catalogue leaps to the eye. However, a system of *quasi-inflexible* rules would only be useful if the exceptional situations which call for a deviation were rare, but even a fairly detailed catalogue of rules like that of the Hague Sales Convention of 1985 and the Austrian Act will face a fair number of cases where the rules miss, where they do not point to the law most closely connected with the contract. In most of these cases the courts will have to sacrifice justice and expediency in order to follow the rules. Experience has shown how courts react when they are directed to make such sacrifices⁶²⁴.

(2) *Result-selective methods*

A. *The opponents of the traditional conflict rules.* — It is submitted that the courts and the legislatures should select a method of some flexibility. There are, however, several degrees of flexibility. Currie's interest analysis and Cavers' teleological approach are, perhaps among the most flexible methods. They look for the relevant policies behind the substantive rules to find a proper solution for the issue before the court.

B. *Currie's governmental interest analysis.* — Currie's main point is that the relevant policies or the governmental interest behind the rule of substantive law determines its application in space (see *supra*, (b) (iii) (2)).

How is a court applying this method to proceed?

Let us assume that country A has statutes prohibiting agreements between attorneys and clients for the payment of contingency fees. A brief statement in the *travaux préparatoires* condemns such agreements as dangerous and unethical; imprecise reasons of this nature are not uncommon.

Relying on the governmental interest analysis a court in country A is faced with difficulties. It may find that the object of the rule is to protect the client against being charged exorbitant fees. But it can hardly have been the purpose of the rule to protect all clients in the world. Following general rules of interpretation and construction it may then maintain that the rule should apply to agreements between attorneys and domestic clients. One may, however, question whether this limitation to domestic clients is justified. Why not protect a foreign client who has made an agreement with a domestic attorney to act in a case before the courts of A? And is it right to extend the rule to all domestic clients? Such a protection might prevent clients of country A from litigating in country B where they cannot obtain legal aid and where the contingent fee agreement is the only device available to a poor client for bringing an action.

Frustrated by these doubts the court may hold that the rule must extend to all attorneys who have been admitted to the bar of country A on the ground that its aim is also to protect the ethics of the bar.

Here again doubts arise. Why only protect the ethics of domestic attorneys? And should the attorneys of country A when engaged in business in country B be prevented from acting there on an equal footing with their colleagues in B who practise the contingent fee?

As we have seen, the courts of country A having enacted the statutes against contingency fees face great difficulties in applying a governmental-interest approach. The problems facing the courts of other countries when confronted with these statutes of country A are even greater.

The example serves to illustrate that the purpose of a statute or other rule of law is sometimes obscure. Sometimes it is also

complex. Even when the purpose of the statute is known and straightforward, its application in space is doubtful. Very often it depends on general policy considerations applicable to a large number of substantive rules governing the same contract. One of these is to determine the economic and social centre of the contract⁶²⁵.

It is submitted that not only the governmental interests behind the substantive provisions, but also other considerations must be taken into account⁶²⁶. Among these, what have been called the rules of the international system figure prominently⁶²⁷. A country which, for instance, has been inimical to commercial arbitration may have enacted rules preventing its citizens and domiciliaries from agreeing to certain arbitration clauses. If, however, these rules are extended to international contracts the result will be that on international markets the citizens of that country will find their position weakened.

Finally, if the application in space of each substantive rule were to be determined separately by the courts, the parties would not be able to predict their application. When making the contract the parties cannot foretell the issue of a future dispute between them and therefore cannot foretell what conflicting rules will be pleaded, what are the conflicting governmental interests behind these rules and which rule will be applied in the end. A conflict rule which covers most aspects of the law of contract and is not restricted to a particular issue will enable the parties better to predict what law will apply⁶²⁸.

C. Cavers' pragmatic method. — Cavers' main concern is to promote the attainment of justice (see *supra*, (b) (iii) (2)). The outcome of each case should turn on a scrutiny of the facts of the transaction giving rise to the issue and on a careful comparison of the outcome that might be reached under a foreign law with that which the *lex fori* would produce in the particular case. The court should weigh both the connecting factors and the competing results of the substantive laws in conflict. In so doing the court should take into consideration whether it is expedient to establish a rule of law. Cavers himself establishes a few principles of preference in contractual matters.

The question is whether Cavers' doctrine is capable of being put into practice.

His two principles of preference mentioned above, though aimed at covering a relatively large area of the conflict of laws of contracts (and property), still leave a substantial area uncovered by rules, especially in the province of the international commercial contracts where the protective laws are not in issue – or should be disregarded – and where the parties have made no agreement on the applicable law. So far it has not been shown how his method could be utilized on a larger scale. The courts have established only very few conflicts rules of a teleological character. Were Cavers' method to be adopted in international conflicts of laws it would require the establishment of a larger number of principles governing the choice of law of contracts. It would be necessary to examine and compare the substantive contract law of a great number of countries before a comprehensive set of principles could be developed. These principles would very likely be more detailed than Cavers' two principles based as they are on the fairly homogeneous American substantive laws. A great number would be necessary and they would be difficult to formulate. The effort required would be very great in proportion to the number of conflict cases that arise. The degrees of success attained through an endeavour of this kind would turn on the degree to which scholars in various countries could agree on the principles to be established, and it would depend upon whether legislatures and courts throughout the world were willing to adhere to them. General agreement is more likely if the rules for choice of law accord equal scope to the substantive law of each country than if they discriminate, for example, between laws offering a "higher" and "lower" standard of protection⁶²⁹.

In the United States a relatively uniform basis should ensure better that the exercise of such pragmatic judgments does not differ too much from state to state than could be expected between country and country in Europe and in other parts of the world. A federal system could much facilitate the adoption of a given policy; but the world is not yet organized as a federal system.

D. The eclecticism of the Restatement 2d (1971). – The guiding principle of the Restatement 2d (1971) is that several choice-influencing considerations should assist in determining the applicable law. These considerations include, on the one hand, the justified expectations of parties coupled with certainty, predictability and uniformity of result, and, on the other hand, the relevant policies

of the *forum*, and of other interested states. Although, as was mentioned under 1 (a) above, the comment offers some guidelines concerning the role of these conflicting considerations, their tentative character will not, it is submitted, give the parties the necessary certainty. As pointed out in 1 (a) above, predictability is incompatible with other choice-influencing considerations. If the need for certainty and predictability is met in some situations only, which are not clearly defined, it has no great value.

The Restatement 2d (1971), however, does not seem to offer American courts any single approach, nor does it prevent them from giving precedence to one or two choice influencing considerations. It is probably not incompatible with the Restatement if in selecting the law governing contracts, American courts pay regard to certainty and predictability sufficiently to stimulate and to satisfy the expectations of the parties.

(3) *Methods relying on the centre of gravity*

A. *General considerations.* — A *via media* between the inflexible rules discussed above and the policy directed methods is supplied by the centre-of-gravity method⁶³⁰. In the present context it means that the contract is to be governed by the law of the country in which its centre is located socially and economically. On the one hand the court is not bound to rely on one connecting factor for all contracts or for all contracts of a particular type. It may take the various connecting factors into consideration and consider them individually in each case. On the other hand the normal structure of the conflict rule is maintained. In general, only the connecting factors count. Furthermore, the connecting factors of the entire contractual relationship as a social phenomenon are taken into consideration and not the contacts relating to the particular issue.

The centre-of-gravity theory has several variants: one will rely always on the constellation of the particular connecting factors of the contract to determine its centre individually. No presumptions are admitted. Another variant encourages the establishment of presumptions for the various types of contracts and for some typical constellations of connecting factors⁶³¹.

B. *Individualization without the assistance of presumptions.* — A few authors have pleaded for an approach which abandons all reliance on established presumptions. In England both Cheshire

and Morris⁶³² find them to be of little value. "To enter upon the search with a presumption", says Cheshire and North "is only too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every single pointer⁶³³." This individualizing method has in fact been adopted by the courts in England and France⁶³⁴. More or less consciously the courts of these countries have omitted to lay down presumptions. Where these methods have been employed, considerable uncertainty has ensued, and a preference for the *lex fori* is noticeable. It was easy for the courts to hide behind the presumed intention of the parties which nobody could verify. However, even after the adoption of an objective method as the one taken up by the English courts which looks for the law, or the system of law, most closely connected with the contract, or the one adopted by the French courts which looks at the parties' localization of the contract, the *lex forism* has not been obviated.

C. *Presumptions*. — The proper law of the contract should not be ascertained by counting but by weighing the connecting factors. These factors derive their weight from the general social policies behind the substantive law rules and from the policies underlying international commercial intercourse, one of which is to consider the average interests of the parties. When weighing the factors the courts should consider these policies.

The law of contract, in so far as it deals with contracts relating to interests in immovables, is intended to apply to immovables situated in the country where these rules are in force, and the country in which an immovable is situated is, in general, more interested than are other countries in having such contracts governed by its laws.

Equality of status among employees and peace of the labour market are ensured if all work carried out in the same country is governed by the same rules⁶³⁵. Therefore the country where an employee carries out his work is generally more interested than are other countries in having its laws govern the contract of employment.

The manufacturer or the merchant who exports goods is subject to more complex duties than the importer. An exporter who sells to importers in different countries has a greater interest than has the importer in calculating the risks and costs on the basis of one law which is his own law.

The normal policy of a country, the law of which contains rules protecting the weak party to a consumer contract will be to extend this protection to its residents. This social policy is in general so important that the habitual residence of the consumer will be regarded as the centre of gravity of a consumer contract.

These and other considerations attaching particular weight to a certain connecting factor or to a constellation of such factors are of a general kind⁶³⁶. They cover most contracts of a certain type and sometimes several types of contracts. These general choice-influencing considerations will therefore lead to the establishment of presumptions for the various types of contracts and for typical contractual situations. Presumptions will perceptively reduce the uncertainty and lack of predictability which are likely to result if the centre of gravity or individualization without the assistance of presumptions is made the basis of the choice of law.

This variant of the centre-of-gravity method has been criticized. It has been argued that the method is a non-rule approach; to weigh contacts which point to various countries connected with the contract is to "weigh that which cannot be weighed". It leads to uncertainty⁶³⁷.

In most cases, however, it will not be difficult to determine the law applicable. The presumptions will take care of the normal cases; in other cases the weighing will, in general, not be complicated; it will occur only when it is alleged that the scales are clearly tipped in favour of another law.

For example, the presumption in favour of the law of the seller's place of business will operate in the usual cases where the contract is entered into *inter absentes* and the goods are delivered in the seller's country, see *infra*, (d) (iv) (1). The centre of gravity may, however, be moved to the buyer's country. Some sellers seek out their customers; they go to their country to negotiate and conclude the contract; or they make the goods they sell in conformity with the special legal and cultural requirements of the buyer's country and keep a stock there from where the goods are delivered. Doubtful cases may always occur but those who criticize the centre-of-gravity method do not pay attention to the larger majority of cases where the method works well.

A trend towards the establishment of presumptions is found in the case law of Switzerland and West Germany. The Czechoslovak Act of 1963 and the Yugoslav Act of 1982 have laid down presump-

tions covering various types of contracts and most of the contracts of international trade. Furthermore, presumptions have been supported by numerous writers on the European Continent such as Batiffol in France, by Dicey and Morris in England, by the authors of the American Restatement 2d (1971), by the draftsmen of the Rome Convention of 1980 and of the proposed Swiss Federal Act on Private International Law.

In (*d*) below some general presumptions covering several types of contracts will be discussed.

(iii) *Objective and subjective methods*

(1) *Terminology*

According to traditional terminology, any evaluation of intentions and interests that are peculiar to the parties in the concrete case before the court is termed subjective. On the other hand, objective considerations are not derived from the interest or will of the parties in the individual case; an objective method denotes a search for the average interests of a multitude of parties in situations analogous to that before the court, and, in addition, of other social considerations irrespective of the interests of the parties.

As mentioned in (*a*) (ii) above, the terms subjective and objective are not used in this sense in the present chapter. The subjective method denotes here the search for the intention of the parties, be it express, tacit or presumed; it includes the concrete interests of the parties in a given case. It takes into account the difference in bargaining power of the parties and considers the interests of the stronger party. It also pays attention to the average interests of a multitude of parties in cases of a similar kind. The opposite of the subjective method is the method which gives preference to social considerations irrespective of the intention of the parties and is particularly concerned with the protection of the weaker party to the contract and of third parties; this is here called the objective method.

(2) *The sphere of the subjective method*

As to contracts for which autonomy is allowed, i.e., in respect of free commercial contracts, the search for the presumed intention and the common interests of the parties, provides useful pointers for the court. It is a natural correlative of autonomy in the conflict

of laws. In the borderline area between tacit party reference and total absence of any intention, the subjective method has its uses. As was pointed out by Wolff⁶³⁸, it has a pedagogical value in encouraging the court to try to put itself in the place of the parties; it does not encourage mechanical counting of elements of contact pointing in different directions but rather a scrupulous evaluation of such elements.

In many situations it makes sense to speak of a presumed intention. Indications of intention such as those which focus on the application of the law which validates the contract, or that in adhesion contracts the law of the stipulator is to apply, carry weight because and only because the parties would presumably have agreed upon the application of this law, had they inserted a choice-of-law clause in their contract. The same is true when the local connecting factors express the common interests or intention of the parties to apply the legal system to which they point. When, for instance, a contract is negotiated and concluded by persons who are both present at the place of business of one of them, the parties will often expect the law of the place of contracting to govern their transaction. To rely on this expectation is to apply a subjective method. When, however, the court attaches weight to this factor because it wants to protect the party who resides at the place of contracting against unusual and unconscionable terms imposed upon him by a foreigner who has sought him out at his place of residence, it follows an objective method.

(3) *The province of the objective method*

Sometimes, however, and even in the free commercial contracts where the parties can determine the law which is to govern, their interests and intentions are not sufficiently conspicuous to allow the court to determine what law applies. Such may be the uncertainty as to what choice of law the parties would have made if they had given thought to the law applicable, that the subjective method cannot offer any guidance. In the absence of any assistance from the conduct of the parties it is impossible to state, for instance, whether the normal interests of the parties to a contract of sale would have led them to select the seller's law, the buyer's law, or the law of the place of performance. If no definite common intention or interest is ascertainable, it will be natural to look to the interests of the community.

In other cases the choice of law should not be based on the intention and the interests of the parties. The weak party's need for protection makes the subjective method more or less inapposite for consumer contracts and in contracts affected by *dirigisme*.

In consumer contracts the presumed intention of the parties would most frequently be identical with the presumed intention of the stronger party. The consumer, however, will often need the protection offered to him by the law of his domicile or by some other law more closely connected with the contract. This need should limit the application of the subjective method as it should limit the parties' opportunity to "agree" on the application of another law for their contract (*supra*, 2 (c) (iii) (5)).

In contracts affected by *dirigisme* the interests of the community will also be a more important factor in the weighing of the contacts. Though the interests of both parties may be served by applying their common personal law to a contract of employment, the community in which the work is performed will be interested in ensuring that the work is carried out in accordance with the laws of that place, and this public concern should, in general, have priority over the individual interests.

It is true that the application of the law of the consumer's habitual residence or the law of the employee's place of work may not always be to the advantage of the consumer or the employee. Another legal system connected with the contract may offer a better protection. But the objective method is not a result-selective method. It recognizes the legitimate interest of the government to secure those persons who have their habitual residence or who work on its territory the protection offered by its laws. It does not seek to apply the law which offers the weak party the best protection.

(4) *Public law and objective method*

There is a need to overcome some of the unfortunate consequences of the deeply ingrained distinction between public law and private law. In the civil law countries and even among authors from the common law countries⁶³⁹ it is agreed that the conflict-of-laws rules do not extend to rules of public law and, in general, courts do not apply foreign public law.

The distinction between private law and public law, though inexact and unjustifiable in analytical jurisprudence is useful also in the conflict of laws⁶⁴⁰. However, it need not be the same for con-

flict of laws purposes as for other purposes. In some respects the conflict-of-laws concept coincides with the traditional civil law concept of public law. Rules inflicting public sanctions and directing public supervision belong to public law. This brings criminal law and a large section of administrative law outside the scope of the conflict rules.

To some extent rules in the nature of public law also regulate the relationship between the parties. Thus the economic legislation, i.e., anti-trust, price and exchange control statutes, import and export prohibitions, etc., often contains provisions declaring agreements made in violation of such legislation to be illegal and unenforceable. In most civil law countries foreign rules of this kind have been denied application even when they form part of the proper law. Several authors, however, and among them the present writer, are of the opinion that these laws should be applied as part of the proper law and also in some other instances (see *infra*, 4).

However, the rules to be discussed in this connection are the "protective" rules. Labour law, the law relating to hire, insurance and to a number of other types of contract contain a great number of rules figuring in a "grey" and ill-defined zone between private law and public law. Statutes granting holidays, entitling employees to old age pensions, etc., are, on the one hand, rules regulating the relationship between private individuals and, on the other hand, to some extent rules of public policy. For this reason they have sometimes been classified as rules of public law. Especially the fact that the parties to labour and insurance contracts are free to choose the applicable law induced the German, French and Italian courts to classify the rules of the kind enumerated above as public law rules, since the intention of the parties is obviously not of paramount significance in this area⁶⁴¹. In accordance with traditional notions Continental courts have held that foreign law of this character should not be applied elsewhere. Only purely private interests inherent in contracts containing foreign elements should be safeguarded by the application of foreign law.

The more *dirigisme* spread into the law relating to contracts of insurance, labour relationships, etc., the more the sector of these contracts which is governed by private law diminished and the wider became the rift between rules of a private law character which are governed by the proper law of the contract primarily designated

by the intentions of the parties and rules of a public law character which apply territorially. Thus in many cases a labour contract was covered by two laws, the public law of the *forum* and the private law of a foreign country.

In the opinion of the present writer the method prevailing in Continental case law ought to be modified in two respects:

(1) The traditional distinction between public and private law should be replaced by a more functional approach in order that the scope of the proper law may be so extended as to admit a substantial part of the protective rules as private law rules.

(2) The influence of party intention on the law applicable to these contracts governed by protective rules should be diminished if not eliminated. This is the price to be paid for widening the scope of the proper law admitting the protective rules. It is not then primarily the interests of the parties but the interests of the States concerned with the contract which will decide which law to apply⁶⁴².

The American practice and theory are able to assist European courts in formulating a new and better distinction between rules which apply "territorially" only and those which can be applied "extra-territorially".

In the American and English conflict of laws the distinction between substance and procedure has previously led to unhappy results comparable to those on the Continent following from the distinction between private and public law. It was based upon venerable traditions or upon the formulation of the statute involved. This practice has been criticized and to some extent this criticism has influenced American courts at least, and English courts when confronted with foreign statutes of limitation. The American and English statutes of limitation and statutes of fraud are no longer classified as rules of procedure⁶⁴³.

As a new and better criterion for deciding whether a rule is substantive or procedural Cook (p. 166) suggested the practical applicability of the foreign rule: "How far can a court of the *forum* go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?"

The same criterion seems to have been applied when deciding upon the applicability of foreign workmen's compensation statutes. The practical possibility of applying such statutes has sometimes been decisive. Where, for instance, the co-operation between the

medical officers, hospitals, and indemnity boards and the courts of the enacting State was so institutionalized and close that it seemed difficult to refer to the foreign law without participating in the operation of foreign administrative procedures, the application of the foreign law was refused. If, on the other hand, the rules could be applied by a foreign court without great practical difficulty, no such refusal occurred.

The same test should apply on the Continent and elsewhere. For the bulk of the protective rules it should be: to what extent can these rules be applied by a court outside the enacting country without unduly hindering and inconveniencing the administration of justice by that court? Many of the rules on employment mentioned above which are within this area would be applicable; so would rent control legislation affecting immovables, etc.

If the proper law of the *contrat dirigé* is made to include such a number of rules expressing a fundamental policy of a particular legal system, a more objective method of ascertaining the proper law must be employed. In these circumstances the law of the country which is most intimately concerned must govern. As mentioned above, the intention of the parties, whether express, tacit or presumed, would play a minor part in selecting the law applicable to this contract.

(5) *Dualism maintained*

Following this approach it is believed that the rules on party autonomy proposed in 2 (c) (iii) (5) above and the centre-of-gravity method supported above (ii) (3) can be combined harmoniously. In business contracts where autonomy is admitted in domestic law, autonomy should also be admitted in the conflict of laws. Even in the absence of any reference by the parties, the subjective method has its uses here. The indications of intention must carry weight and the connecting elements may be weighed in the light of the intention and interests of the parties. For consumer contracts and for those contracts where *dirigisme* has substantially restricted the freedom to negotiate the terms, the choice of law should also be restricted. Here the connecting elements considered in the light of the purpose of the domestic rules relating to the particular type of contract should be determining in localizing the relationship.

(d) *Evaluation of the connecting factors*

Plan. — In the following those connecting factors and indications of intention will be analysed which are of importance for several types of contracts. The connecting elements which will be examined are the *forum*, the *situs* of an immovable and of a movable, the place of contracting, the place of performance, the place of business, the habitual residence and the nationality of the parties, and the fact that one party to the contract is a State. The indications of intention to be examined are the fact that the contract is an adhesion contract limited to a certain legal system and the existence of a validating law with which the contract is connected. Other indications of intentions such as the clause submitting to the jurisdiction of the courts of a certain country for the settlement of disputes arising out of a contract or to arbitration in a particular country have been discussed in 2 (d) above.

(i) *The forum*

The *forum* has, in fact, been a very important connecting factor in practice for determining the applicable law (see *supra*, (c) (i)). However, if predictability is an important choice-influencing consideration, the place where the action is brought should carry little weight because in international contract the *forum* — and therefore also the law of the *forum* — will often be unknown when the contract is made.

If the *forum* is known at the time when the contract is concluded, its importance as a connecting factor is and should be considerable. As mentioned *supra*, 2 (d) (i), a clause submitting to the jurisdiction of a court in a particular country will often lead the court to apply the law of the *forum*.

The weight of other connecting elements will also be increased by the fact that they frequently coincide with the *forum*. This is true of the *situs* if the contract concerns an immovable, and of the domicile of the debtor if the contract is unilateral⁶⁴⁴.

(ii) *Contacts of the subject-matter of the contract*

(1) *Immovables*

By the laws of most countries contracts concerning immovables are in general governed by the law of the *situs* of the immovable.

The government of the *situs* will have an interest that these contracts are governed by its laws. This applies above all to agreements for a lease or tenancy but also some agreements to purchase an immovable or to lend money on the security of a mortgage. Thus, the policy considerations in favour of applying the *lex situs* to contracts concerning immovables may be so strong as to outweigh the governmental interests of other States and the diverging intention of the parties⁶⁴⁵. Besides, the application of the law of the *situs* is supported by an old tradition⁶⁴⁶. It is practical because the courts of the country where the immovable is situated generally have jurisdiction and because matters involving title to immovables are governed by the *lex rei sitae*. In dealings concerning immovables, proprietary and contractual aspects are so intimately connected that if different laws were applied to them this would lead to difficult distinctions and to inconsistent results.

(2) *Movables*

Contracts concerning movables, the situation of which is known at the time of contracting, will sometimes be governed by the law of the *situs*. This may, for instance, be true in the case of a sale of standing timber. In normal transactions of foreign trade, however, the *situs* of a movable will be of little importance.

Contracts for the carriage of goods and passengers by sea and air and articles entered into by seamen will be governed *prima facie* by the law of the flag, at least in certain circumstances⁶⁴⁷.

(iii) *Contacts created by the contractual acts*

(1) *The principle of territoriality*

For centuries it has been maintained that a contract must be governed either by the law of the place of contracting or by the law of the place of performance because the sovereign of the territory in which an act is carried out is the power and the only power which may attach legal effects to the act. For a long time this belief sustained the principle of the territoriality of laws which, in turn, brought forward several theories to explain why a foreign *lex loci actus* must be applied (comity⁶⁴⁸, vested rights⁶⁴⁹, etc.). Territoriality has in fact become a very ambiguous term in the conflict of laws⁶⁵⁰. Moreover, the idea that the law of the place where an act occurs should govern the act has dominated the common law

countries and has influenced several of the civil law countries⁶⁵¹. The idea, it is submitted, has not been abandoned completely although, as will be seen, it will not always result in the application of the law of the place of contracting or the law of the place of performance, and although it cannot claim any general validity based on *a priori* considerations.

(2) *The place of contracting*

In former times the place of contracting was regarded as the most significant connecting factor. It still has significance in many countries⁶⁵².

As mentioned above, abstract principles have been invoked in favour of the application of the *lex loci contractus*: the contract must be governed by the law of the place where it came into existence⁶⁵³. That law and only that law can indicate whether the agreement became a valid contract. Therefore, the law of the place of contracting must apply "by the general law of nations, *jure gentium*"⁶⁵⁴.

Most lawyers agree nowadays that neither logic and necessity nor public international law require the application of the *lex loci contractus* and that the conflict rules should be framed according to economic and social considerations⁶⁵⁵. The importance of the place of contracting as a connecting factor should be determined by these standards and not by general *a priori* maxims.

A. Contracts made inter praesentes; the place of negotiation. — If the parties have negotiated and made the contract while both were present at the place of business of one of them, the contract will often have its centre of gravity there. The application of the law of that place meets the general expectations of the party who is at home there and who may not realize that he is dealing with a foreigner or does not appreciate the consequences thereof. It is also supported by the consideration that a foreigner who seeks out another party must be taken to have submitted to the law of the residence of the latter⁶⁵⁶. The place of contracting may also carry weight if the contract is made *inter praesentes* either at the place of performance or at some other place having a significant contact with the contract.

The fact alone that a contract has been negotiated in a particular country will seldom carry much weight. A contract made at the

J. F. Kennedy Airport in New York between a Swiss and an Argentinian businessman which has no contact with the state of New York should not be governed by New York law⁶⁵⁷. It could be argued in favour of applying the *lex loci contractus* to such cases that at the place of negotiation parties can obtain the services of a counsel to help them draft their agreement, that courts and other judicial authorities there will be available for non-contentious proceedings in connection with the formation of the contract, and that counsel and the courts will act in accordance with their own laws. Few commercial contracts, however, will need the help of counsel in drawing them up. In those cases where legal advice is needed modern means of communication make it easy to obtain this advice over large distances, and the necessity of resorting to non-contentious proceedings arises mainly where land is being conveyed or mortgaged, and in these circumstances the *lex rei sitae* will apply.

Dealings at commodity and security exchanges and at auctions should, however, generally be governed by the *lex loci* regardless of the residence of the parties. He who patronises such a market submits to the rules in force there because he knows that he can only contract there swiftly and safely if those rules apply⁶⁵⁸.

B. *Contracts made inter absentes*. — In England and the United States as well as in the Commonwealth countries the place of contracting has played an important part even when the contract is made between parties communicating across frontiers⁶⁵⁹. In these countries contracts made by letter are considered to be made at the place where the letter of acceptance was posted. If the parties use “instantaneous” means of communication such as telephone, teleprinter or teletype, the solution is more doubtful. For the purpose of jurisdiction an English case has held that a contract made by teletype was made where the acceptance was communicated to the offeror, i.e., in the country of the offeror⁶⁶⁰.

These rules, however, are not accepted everywhere.

Conflict-of-law statutes of some countries designate the place of contracting for contracts made *inter absentes*. The Taiwan Act of 6 June 1953, Article 6, paragraph 2, and the Japanese Horei, Article 9, paragraph 2, designate the place from where the offer is sent as being the place of contracting. The Thailand Act, Article 13, paragraph 2, refers to the place where the acceptance is received.

In Soviet Russia the State Foreign Trade Arbitral Commission in

its earlier practice, in resorting to the law of the place of contracting, relied on the substantive law of the country where the offer was made to determine where the contract was made⁶⁶¹. Article 126 (4) of the General Principles of Civil Law now provides that the place of contracting is determined by Soviet Russian law, and this probably means that a written contract *inter absentes* is regarded as made at the place where the acceptance is received by the offeror⁶⁶².

Thus several countries, though relying on the law of the place of contracting, do not agree on a place of contracting. In reality contracts concluded between parties communicating across frontiers are made not in one place, but in two. As two laws cannot govern a contract, a more or less arbitrary choice of one of the two laws has to be made.

More than a hundred years ago the place of contracting lost its importance in business practice. Contracts ceased to be made mainly *inter praesentes* and were no longer necessarily to be performed where made. This fact should have reduced the importance of the place of contracting in contracts made *inter absentes*. It is a striking example of the conservatism of lawyers that the place of contracting still carries so much weight in so many countries.

(3) *The place of performance*

Today the place of performance is regarded as an important contact in many countries. In England and France it plays a part almost equal to that of the place of contracting. In some member states of the United States the place of performance is the decisive contact for questions pertaining to the performance of the contract. The Treaty of Montevideo prescribes the application of the law of the place of performance for most contractual problems. In West Germany until 1986 the law of the place of performance was applied where the courts did not rely on the express, tacit or presumed intentions of the parties.

The French writer Batiffol⁶⁶³ has advocated that the parties should be presumed to have localized their contract at the place of performance. In his view, performance is the object of the agreement. At the place of performance the contract will "manifest" itself to the outer world. The expectations of the parties are directed towards the fulfilment of the obligations and that fulfilment will occur at the place of performance. In carrying out many of his

acts the performing party is bound to obey the law in force at the place of performance. When each of the parties to a bilateral contract has to perform in the country of his residence two legal systems might apply, but such a "scission" of the contract must be avoided. One of the two possible places of performance of a bilateral contract must prevail; according to Batiffol this must be the place where the characteristic obligation is to be performed. In sales the characteristic performance is the supply of the goods by the seller, in employment contracts the work of the employee, in insurance contracts the assumption of risk, etc.

The arguments of Batiffol in favour of the place of performance carry weight in respect of many contracts. Employment contracts, contracts for labour and work, some distributorship contracts and some licensing contracts should *prima facie* be governed by the law of the place of performance⁶⁶⁴.

In these as in other contracts the emphasis should, if possible, be laid on the performance of the characteristic obligation, as suggested by Batiffol.

However, reliance on the place of performance has shortcomings.

In some cases this place in its technical legal sense is not significant as a connecting factor because it is not the place where the essential performance takes place. In contracts of sale the place of performance is often the place where "the seller is to complete his performance with reference to the physical delivery of the goods"⁶⁶⁵. This place may be the place where the risk passes, but is not always the place where the seller in fact manufactures, collects, packs and dispatches the goods. A Californian seller who sells goods f.o.b. Chicago to a New York buyer "performs" his contract in the legal sense of the term in Chicago, but in reality the performance is carried out at his residence, and his performance is completed when he delivers the goods to a common carrier in California.

In respect of some contracts the laws of various countries disagree as to where the place of performance is. Monetary obligations are to be performed at the place of the creditor's domicile according to English and Scandinavian law, but at the place of the debtor's domicile according to German law⁶⁶⁶.

Finally, in some contracts the place of performance is dispersed over several countries or is unknown at the time of contracting⁶⁶⁷. According to most charterparties the shipowner must perform his obligations both at the place of loading and at the place of discharge,

and sometimes when signing the charterparty he will not know where the cargo is to be loaded or to be discharged.

The importance of the place of performance will in each case depend on whether that place effectively is the place where the contract is to be carried out. If the real place of performance is located in a particular country and if this place was known at the time of contracting then the place of performance is of significant importance.

(iv) *Contacts of the parties*

(1) *The place of business*

A party to a contract is subject to the law of his place of business in carrying out those acts (including entering into contracts) preparatory to the performance of his obligations under his international contract.

The parties to an international contract generally have their places of business in different states or countries. As a contract should not be governed by two laws the law of one of the parties must be preferred, and here, too, the place of business of that party should be chosen whose performance is more complex and therefore more extensively regulated by the law. Whenever a person for a monetary consideration agrees to provide a movable, a right, the use of a thing or a right, the cover for a risk, a completed piece of work, or some other object that characterizes the contract as a sale, a hire, an insurance contract, an agency contract, or a contract for the rendition of services, the obligations of the party who might be described compendiously as the "seller" are generally more complex and therefore more regulated by the law than those of the party who might be described somewhat inaccurately as the "buyer"⁶⁶⁸. It is also generally the "seller" who frames the conditions of the contract.

A basis for applying the "seller's" law is therefore that mass bargaining like mass production, brings down the cost and the price. The enterprise must calculate expenditure and risks on the basis of a multitude of contracts, and this calculation can be made more safely if all the contracts are governed by the same law, i.e., the law of the seat of the enterprise.

Moreover, the principal place of business is the real place of performance of most contracts made by an enterprise. At this place

most of its contracts are prepared, calculated, decided upon and performed. In some contracts, as for instance contracts of sale, clauses such as f.o.b. and "free delivery" may locate the technical place of performance at another place, but the centre of the real obligations of the seller remains at his principal place of business.

In fact the theory of the characteristic obligation rests on two main assumptions. The duties of the party performing that obligation are more detailed, more complicated and more regulated by law than are the duties of the other party. Moreover the debtor of the characteristic performance is acting within the ambit of his commercial expertise; the other party is his customer⁶⁶⁹.

The rule deserves a broad, although not a universal, application. The law of the principal place of business of the "seller" should apply *prima facie* to the following contracts: commercial sales and hire of movables, agency contracts and other commercial contracts for the rendition of services, contracts made with banks, other finance companies, contracts made with professional men and transport insurance.

In Germany an ever-increasing number of contracts was covered by this rule⁶⁷⁰, before it was enacted by the new law of 25 July 1986 on private international law. It also seems to have been widely followed in Switzerland since 1951⁶⁷¹.

The Czechoslovak Law on Private International Law and International Procedure of 4 December 1963, section 10, the Polish Act of 12 November 1965 on Private International Law, Article 27, the East German Act of 5 December 1975 on the Application of Law, section 12, the Austrian Act of 15 June 1978 on Private International Law, the Hungarian Ordinance of 1979 and the Yugoslav Act of 15 July on Private International Law all accept this principle, and the Comecon General Conditions provide that the law of the seller applies to sales of movables and to the erection of plant and machinery. The Rome Convention of 1980, Article 4, contains a general presumption in favour of the law of the place of business of the party who is to carry out the characteristic performance of the contract. The Hague Conventions on the Law Applicable to International Sales of Goods of 1955 and of 1985 both prescribe the application of the law of the seller as the general rule.

There is some divergence as to what is the characteristic performance. The Austrian Act of 1978 presupposes that a characteristic performance is lacking in bilateral contracts where both parties

owe money, and in contracts where none of them owes money to the other party, see Article 36. Such contracts, if not covered by other special rules, such as Article 38 which deals with contracts with banks and insurance companies, are governed by the rule on the strongest connection in Article 1 of the Act⁶⁷².

The Rome Convention 1980 seems to take a different attitude. In bilateral contracts, the Report says,

“the counter performance by one of the parties in a modern economy usually takes the form of money. This is not, of course, the characteristic performance of the contract. It is the performance for which the payment is due, i.e., depending on the type of contract, the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport insurance, banking operations, security, etc., which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction⁶⁷³.”

It is submitted that it is the latter, the function of the operation that matters for the determination of the characteristic performance. To achieve the economic purpose of the contract one of the parties “buys” the other party’s performance. The buying party generally pays money for that performance. However, the party who effects the characteristic performance may also pay money. This is true of the insurer, the surety and the money lending bank. As can be seen from the Report insurance, banking operations and security transactions are covered by the rule in Article 4 (2) on the characteristic performance. However, the Report is not clear as to whether contracts under which the “buyer” of services does not pay money to the other party are covered by the rule. Does Article 4 (2) cover distributorship agreements where the distributor undertakes to market the manufacturer’s goods and to publisher’s contracts where the publisher undertakes to print, bind and market the author’s work? The manufacturer and the author do not pay money to the distributor and the publisher who are “paid” by selling the product to the public. Their performance, it is submitted, is the economic purpose of the agreement, and is therefore the characteristic performance.

However, the rule on the characteristic performance does not apply in all circumstances. First, in certain types of contracts it is difficult, if not impossible, to state which of the parties is charged

with the characteristic performance. Co-operation agreements between enterprises and barter are contracts where it is impossible to make such a determination. Second, there are contracts where other connecting elements carry more weight than does the place of business of the party performing the characteristic obligation⁶⁷⁴.

As mentioned above the relevant connecting factor for physical persons and for companies is their principal place of business. In Europe the preparation, negotiation and performance of a contract made by a company generally takes place in accordance with the law of one country⁶⁷⁵. The company is incorporated and has its seat of administration, its centre of control and management and of its production in the same country. In the United Kingdom and in the countries of the Commonwealth, and even more so in the United States, however, it will happen more frequently than in Europe that a company has its place of incorporation in one State, its place of administration in another and its place of production in a third State. In the United States where some authors have argued in favour of an increased reliance on the place of business of the parties⁶⁷⁶, it may therefore be difficult to locate the principal place of business of a corporation. Here, where each state has laws of its own, one cannot maintain as in Europe and elsewhere that the preparation, completion and performance of a contract will take place in accordance with the laws of one legal system. It is, however, generally accepted that the place of incorporation has little significance in contractual matters⁶⁷⁷. A problem of finding the principal place of business arises where the centre of control and management of an enterprise is located in one state and the production or manufacture takes place in another. In such cases each of these contacts will carry some weight. It is believed that in most cases the location of the centre of control and management will be a more important contact than that of the place of production or manufacture⁶⁷⁸.

Another problem arises when the contractual acts or some of them, be it the negotiation, preparation and performance of the contract, are carried out from another place of business of the "seller" than the principal one.

The question which of "the seller's" places of business is then to be relied on has been solved differently in the Conventions. Under Article 4 (2) of the Rome Convention the presumption applies in favour of the "seller's" principal place of business. If,

however, under the terms of the contract the performance is to be effected through a place of business other than the principal place of business the contract is presumed to be most closely connected with that place. Article 4 (2) does not exclude the application of the law of another place more closely connected with the contract. If, for instance, the contract was negotiated, concluded and its performance prepared through a place of business other than the one through which the performance was effected the law of the former place would be applied, see Article 4 (5).

The Hague Sales Convention 1985, Article 14 (1), does not operate with any presumption as to which place of business to rely on. The relevant place of business is that which has the closest connection with the contract and its performance having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract⁶⁷⁹. The difference between the conventions is slight. The Rome Convention has the advantage of providing a rule for the doubtful cases.

(2) The habitual residence

Legislation and the practice of the courts have established that the habitual residence of the party performing the characteristic obligation is to replace the place of business as the connecting factor when the party does not have a place of business.

However, in contracts with consumers and other weak parties the habitual residence of the consumer or the weak party may be decisive. In the United States life insurance contracts have frequently been held to be governed by the law of the habitual residence of the insured party⁶⁸⁰. The rationale of the rule, which is to protect the insured party, would justify a broader application. Other contracts with consumers such as sales and small loans, etc., should, in general, be governed by the law of the habitual residence of the consumer⁶⁸¹.

In West Germany⁶⁸² and Scandinavia⁶⁸³ it has been held that the law of the residence of the debtor should *prima facie* govern promises of gifts, promises to guarantee debts and other unilateral contracts. This presumption is supported by the consideration that the residence of the debtor is a likely *forum* for disputes and that it may be convenient and equitable to let the law of the obligor govern his obligations.

(3) *The nationality*

On the European Continent the principle of nationality (or of the personality of laws) was contrasted with the principle of territoriality. It was suggested that the rights and duties of a person are governed by the law of the country of his nationality (*lex patriae*).

During the conceptualistic era of private international law some European authors wanted to extend this principle to the law of obligations, including the law of contracts. According to a German writer, an obligation is a command from the law to the citizen to act or to forbear from acting. The only authority which may order a person to act or not to act is the government of the country to which he belongs as a citizen. Consequently an obligation – including a contractual obligation – must be governed by the *lex patriae* of the debtor⁶⁸⁴.

In several countries belonging to the world of the civil law, the national law, if common to the parties, has been applied by virtue either of a fixed rule (see *supra*, (b) (i) (1)), or of a presumption⁶⁸⁵.

However, a person doing business has his links economically and socially with his place of business and, in non-commercial matters, a person is attached to his domicile or habitual residence. This fact has induced the legislatures of some countries to introduce a rule or a presumption in favour of the common domicile or place of business of the parties⁶⁸⁶. In the other countries the rule of the common national law has survived perhaps mainly because the national law in most cases is also the law of the domicile.

Though not strong enough to warrant a presumption the common nationality will sometimes carry weight. When two persons of the same nationality make a contract which has considerable connections both with their home country and with another country it may sometimes be concluded that they contracted on the assumption that their national law would govern, and this may lead the court to apply it⁶⁸⁷.

(4) *Contracts with States*

The role which the public sector has come to play in the economy of industrial States has made government an increasingly important partner to contracts. Both in the European Communities and elsewhere rules designed to prevent discrimination against foreign enterprises established in Member States should lead to an

increase in commercial dealings by governments with foreign firms.

To an increasing extent governments and government agencies use standard forms of contract to which the private party must adhere. These contracts of adhesion will be examined under (iv) below. Here it will be discussed to what extent the sole fact that a government is a party may lead to the application of the law of the state of that government.

There can be little doubt that a State will regard such agreements concluded by it in the direct exercise of its governmental authority as governed by the private and public law of the State. This applies, for instance, to agreements between a government and a foreign enterprise concerning the taxes payable by the latter to that State. It also applies to concession agreements whereby a government allows a foreign enterprise to exploit the oil and mineral resources in the subsoil⁶⁸⁸.

More doubtful are the cases where the government does not act *jure imperii* but only *jure gestionis* as an equal partner to a contract which is not an "administrative", but a "private" one.

The distinction in the various countries between "administrative" and "private" contracts is not uniform. The classification will depend upon the law of the *forum*. Thus, the French *Conseil d'Etat* has held that an agreement between the French State and a private party concerning delivery of mail bags to the French command in the Lebanon was an administrative agreement to be governed by French law⁶⁸⁹. A contract, however, between the French State and a Turkish landlord concerning a lease of a house in Istanbul was considered to be an agreement in the nature of "private law" governed by the *lex situs*⁶⁹⁰.

Where the contract is a private one most Western courts have considered the fact that a State is a partner to be "an element to be considered but no more"⁶⁹¹. There are English⁶⁹², French⁶⁹³, German⁶⁹⁴ and Scandinavian cases which support this view. The case law of these countries does not support the general presumption in favour of the law of the State established by the Permanent Court of International Justice in the cases concerning the *Brazilian and Serbian Loans*⁶⁹⁵. This was confirmed by the English, Danish, Norwegian and Swedish gold clause cases⁶⁹⁶. There are, however, cases where this element has led to the application of the law of the State concerned⁶⁹⁷.

The Soviet Russian author Lunz maintains that the law of the

State concerned must apply when a contract is made with a State as a contracting party. A State concluding private acts does not cease to be a sovereign, it does not submit to the will of another State and does not abide by foreign law unless it has consented to it expressly and in the proper manner⁶⁹⁸. Lunz' view probably expresses the attitude of the Socialist countries. The State-owned enterprises of these countries are, however, considered to be legal persons of their own. They do not possess any State immunity and are subject to the ordinary rules of private international law⁶⁹⁹.

Apart from cases where the State acts *jure imperii* there seems to be little reason to treat a government differently from other enterprises. A government running railroads and shipping lines should, of course, enjoy the benefit of the rule that the law of the party performing the characteristic obligation is to apply, but a government buying mail bags from a manufacturer or making a contract with a foreign contractor to construct an embassy building should not be treated differently from a private enterprise buying cotton bags or having a house built abroad. In some cases the government will not be interested either in having its own law apply.

(v) *Indications of intention*

(1) *Tacit and presumed intention*

Even if the presence of one of the connecting factors mentioned in 2 (d) above does not *per se* lead the court to infer that it is the object of a tacit choice of law, its presence together with that of connecting factors pointing to the same legal system may make the court accept that a presumed intention to apply that system exists. This is the case if the parties submit to the jurisdiction of the courts of, or to arbitration in, a particular country, or if they refer to a statute or a custom or if they use a legal institution of a certain country. It will depend upon the circumstances of the case when a court will assume that a tacit choice of law has been made and when it will give effect to what it finds to be a presumed intention⁷⁰⁰.

The indications of intention⁷⁰¹ mentioned above should carry weight in cases involving free commercial contracts where the parties could have selected the applicable law. In contracts where party autonomy is restricted, such as consumer contracts and contracts affected by *dirigisme*, these indications should not have the same significance. This general rule also applies to the two factors to be mentioned in the following sections, the fact that the

contract is an adhesion contract, and the fact that the contract is valid by one of the laws with which it has a local connection.

(2) Contracts of adhesion

In several countries, especially on the European Continent, standard contracts containing uniform conditions concluded with an enterprise, the substance of which is either not open at all to negotiation by the other party or only to a very limited extent (adhesion contracts), are, in general, governed by the law of the business domicile of the enterprise. The rule applies to insurance contracts, contracts with banks and finance houses, with telephone and telegraph companies, and the like. In most instances the result is the same as if the rule mentioned above (iv) had been followed that the law of the "seller" applies, but the use of an adhesion contract often adds strength to this presumption.

If the adhesion contract is based upon a law other than that of the place of the enterprise, this latter law should apply. This may occur when the contract is made with a view to a specific foreign market, as in the case of some Scandinavian gold bonds which were meant for and issued upon the American market ⁷⁰².

The presumption, however, should only be employed in connection with those commercial contracts where the parties are free to stipulate the contents of the contract, but not in contracts affected by *dirigisme* according to the law of a country which has a close contact with the contract concerned. Nor should the presumption be relied upon in consumer contracts where another law is ordinarily applicable.

(3) The validating law

Finally, there is a presumption in favour of applying the validating law in cases where one or several of the laws with which the contract is connected invalidate the transaction or parts of it and where one or several other laws validate it. This presumption is supported by English ⁷⁰³, French ⁷⁰⁴, American ⁷⁰⁵ and Scandinavian ⁷⁰⁶ authorities. It should, however, be relied upon only in commercial contracts where freedom of bargaining exists. By contrast — as American cases show (*supra* (b) (iii) (2)) — the presumption of validity should not be invoked in respect of labour, life insurance, or conditional sales contracts where mandatory rules of the law of the place of work, the law of the insured party's domicile, or the

law of the place of consumption of the goods offer protection to the worker, the insured party or the buyer against a stronger party.

4. *Essential Validity, "les lois de police"*

(a) *Plan*

In the following we will treat the question whether the essential or material validity of the contract is governed by the proper law. The concept of material or essential validity is used differently. It is here applied as covering situations where something in the nature of the contract itself, in its purpose or in its terms makes the contract or part of it invalid or unenforceable. An invalid or unenforceable term of a contract which is valid in other respects may be held inoperative or may be replaced by a mandatory rule of law.

Several authors maintain that the essential validity of the contract should be governed by its proper law⁷⁰⁷. Some courts have adhered to this view. Many cases, however, have shown that it suffers many exceptions.

In this section we will treat both public and private law rules. The public law rules dealt with are the laws on restrictive trade practices, price laws, exchange control regulations, import and export prohibitions, trading-with-the-enemy acts, embargoes and other economic and political laws in so far as they affect the essential validity of the contract⁷⁰⁸.

First we will deal with the law as it is in the various countries beginning with the exceptions to the rule on the proper law and then treat the area which remains for the operation of the proper law. The following passages will be devoted to a critique of the existing rules and practices. Here the private and the public law rules will be dealt with separately.

(b) *The laws*

(i) *The exceptions to the rule of the proper law*

(1) *The "directly applicable" rules of the forum always govern*

The validity of a contract or a contractual term is everywhere determined in accordance with the law of the *forum* when a statutory provision of the *lex fori* by its terms or by virtue of statutory interpretation applies to the contract⁷⁰⁹.

This rule, formulated by Dicey and Morris as representing the

law of England expresses what in recent French, Italian and Dutch theory is understood by the directly applicable rules⁷¹⁰ of the *forum*. They are the rules which the *lex fori* or its courts hold to be of such importance that they are made applicable irrespective of which law would otherwise govern the legal relationship according to the conflict rules of the *forum*.

Such directly applicable rules are found both in private and in public law. Countries having enacted the rules of the Convention for the Unification of Certain Rules relating to Bills of Lading (the Hague-Visby Rules) have in the statutes provided for their own spatial application⁷¹¹. They apply to every bill of lading relating to the carriage of goods between the ports of two States if the bill of lading is either issued in, or the carriage is from, a contracting State, or if the contract contained in or evidenced in the bill of lading provides for the application of the Rules. They apply whatever the proper law of the contract may be⁷¹². Some American state statutes on insurance contracts protecting the policy holder also provide for their own spatial application⁷¹³. In several countries statutes protecting the employee in his relationship with the employer are by virtue of an express provision or by way of interpretation applied to contracts which are to be performed in the territory of the enacting state⁷¹⁴.

Exchange control regulations of several countries contain provisions which determine the sphere of operation of these regulations⁷¹⁵, and so have statutes concerning restrictive trade practices. The personal and territorial ambits of the exchange control regulations vary but most of them apply, *inter alia*, to international payments to or from residents of the enacting country⁷¹⁶. The scope of the restrictive trade practices acts also varies, but most of them apply to the restraints of competition which have effects upon the national market⁷¹⁷. Even in countries the legislation of which does not spell out their application in space these statutes are, in general, as far as their effects on the validity of cartel agreements are concerned, interpreted to apply to restraints of competition having effect upon the national market⁷¹⁸.

(2) *Refusal to apply foreign rules of law on grounds of public policy*

It is a principle adhered to everywhere that the validity of a contract depends upon the effect which is given to it by the law of the

forum or, in other words, that a rule of the otherwise applicable law is disregarded when it would be contrary to the public policy of the *forum* country to apply it⁷¹⁹. The public policy rule has struck at foreign invalidating rules such as foreign exchange control regulations prohibiting payment to foreigners and to statutes rendering gold clauses invalid⁷²⁰. It has also struck at foreign permissive rules such as rules tolerating contracts made by an attorney at law for a contingency fee representing a share in the proceeds of an action, if successful, at the so-called champertous contracts⁷²¹, at gambling contracts⁷²², at contracts involving payment of commissions, arising out of corrupt transactions⁷²³, etc. Contracts which violate the laws of other countries have also been considered invalid under the public policy rule⁷²⁴.

The principle of public policy has been used more readily by the courts of France than by the courts of the common law countries, Germany, Switzerland and the Scandinavian countries.

(3) *Foreign public law rules are refused application*

Besides being held inapplicable on grounds of public policy, rules in the nature of foreign penal, revenue and other public law rules have been considered inapplicable by the courts of the civil law countries. The same fate has overtaken the economic laws regulating the validity of contracts. They have been held to be "territorial" or inapplicable by their very nature of public law. The reasons given have been of a speculative nature. The public laws concern State interests. States are enterprises in a wide sense of the word and, absent treaties and other agreements between them, pursue their own aims in an international environment which is basically competitive⁷²⁵. The foreign public law rules have therefore been refused application even when the foreign law in question was the proper law of the contract⁷²⁶.

In the common law countries, however, the courts have been more willing to consider foreign economic laws which are not penal and revenue law⁷²⁷ than have the courts of the civil law countries. Thus in the common law countries foreign exchange control regulations which predominantly serve public interests have been applied if they claimed to apply and if they formed part of the proper law⁷²⁸, and foreign export restrictions and price regulations have also been considered⁷²⁹. In the civil law countries the application

of foreign exchange control regulations not covered by an international convention such as the Bretton Woods Agreement has in many cases been refused⁷³⁰. In the civil law there is a basic distinction between private law to which the conflict rules apply and public law which has been held to be outside the scope of the private international law rules. However, in the civil law it has been realized that the distinction between private law and public law is blurred. There is a border-line area covered by rules which are neither clearly private nor obviously public law rules. Some of the economic legislation such as the laws abrogating gold clauses, price regulations and some of the laws prohibiting restraints of competition also regard individual interests. The more a substantive rule looks to the interests of the contracting parties or one of them, the more likely is it to be applied as a private law rule. The more it tends to protect the State's economy or business or consumers' interests in general, the more it is likely to be refused application as a public law rule. In some cases foreign laws abrogating gold clauses⁷³¹ and statutes prohibiting covenants in restraint of trade⁷³² have not been refused application by courts in civil law countries because of their public law character.

Authors in civil law countries have argued for an application also of foreign predominantly public law rules such as exchange control regulations⁷³³. Some of these authors have expressed the view that these laws should be applied where they claim to apply and where they are part of the proper law⁷³⁴. Some have advocated a wider application⁷³⁵. Thus Zweigert has argued that foreign laws abrogating gold clauses, exchange control regulations, import and export prohibitions and anti-trust laws interfering with the performance of a contract should apply when they claim to apply provided that the interests of the country of the *forum* or of a third country are not unduly violated. The foreign prohibition should apply when from an international point of view its intended scope of application is reasonable⁷³⁶.

In some cases the illegality of performance according to foreign laws has been taken into account when this law was the law of the place of performance. In England and other Commonwealth countries it has been held that the contract was considered to be invalid in so far as the performance of it was unlawful by the law of the country where the contract was to be performed⁷³⁷.

In the civil law countries the mandatory provisions of the *lex*

loci solutionis rendering the contract or one of its terms illegal or unenforceable will not necessarily make the contract or the contractual term invalid or unenforceable. However, illegality under the *lex loci solutionis* has sometimes been taken into account as a "fact" which the proper law of the contract must take into consideration as a physical impossibility which exonerates the obligor. Illegality or unenforceability under the law of the habitual residence of the obligor has been treated in the same way⁷³⁸.

(4) *Application of foreign law which is not the proper law*

Sometimes foreign rules concerning essential validity are applied not as rules forming part of the proper law of the contract but because some other connecting element points to the law of the enacting country⁷³⁹.

An example of this is offered by Article VIII (2) (b) of the International Monetary Fund (Bretton Woods) Agreement⁷⁴⁰ to which many countries are members. Whatever their proper law, exchange contracts are unenforceable if they involve the currency of any member of the International Monetary Fund, and if they are contrary to the exchange control legislation of any member which is imposed in accordance with the International Monetary Fund Agreement.

Under this rule the enforceability of the contract is probably governed by the law of the country whose currency reserves will be affected by the payment. The obligations of such contracts will not be implemented by the courts of member countries, for example by decreeing performance of the contract or by awarding damages for non-performance⁷⁴¹.

In other respects the courts have been very reluctant to apply foreign rules which are not part of the proper law of the contract⁷⁴².

The idea of giving effect to foreign directly applicable rules of a law other than the proper law of the contract has been favoured by more and more authors and has found its way into the Hague Agency Convention 1978, Article 16, the Hague Convention on the Law Applicable to Trusts, etc., 1984, Article 16 (2), and in the Rome Convention, Article 7 (1), which provides:

"When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection,

if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to the consequences of their application or non-application⁷⁴³.”

As is seen the requirements for giving effect to a foreign mandatory rule are the following:

(a) The rule in question must have a close connection with the situation, i.e., the contract as a whole. Thus, the court must refuse to give effect to foreign “long arm” statutes claiming application to the issue if the contract does not have a close connection to the enacting country. An illustration is given *infra* at (c) (iii) (Illustration 1).

(b) The foreign rule must claim application to the issue whatever the law applicable to the contract. This “claim” must be evidenced by an explicit statement in the statute as to the geographical scope of the rule or it must follow from a statutory interpretation.

(c) When deciding whether to give effect to the rule the court will have regard to its nature and purpose and to the consequences of its application or non-application. Here the court will exercise a reasonableness test, see *infra* (c) (iii).

The Hague Conventions of 1978 and 1984, and the Rome Convention do not distinguish between rules of private and public law.

(ii) *The domain of the proper law*

In spite of the many exceptions just mentioned an area remains for the operation of the proper law. It is not possible to give an account of all the issues to which the *lois de police* claim application which the courts have treated as questions governed by the proper law of the contract. A few points should, however, be considered.

The readiness of the courts to accept the policies behind the doctrine of the proper law of the contract becomes apparent when they disregard invalidating rules of the *forum* in favour of validating rules of the proper law, especially when the contract has significant local contacts pointing to the country of the *forum*. The French decisions concerning the validity of arbitration clauses provide an illustration (see *supra*, 2 (b) (ii)). There are, however, also cases from other countries⁷⁴⁴.

It is also a sign of readiness to adhere to the proper law doctrine when the courts apply invalidating rules of a foreign proper law in cases where the contract or the contractual term in question might have been saved from invalidity by application of the law of the *forum* or of another law having a significant local contact with the transaction. The English and the Scandinavian gold clause cases of the 1930s are examples of this readiness⁷⁴⁵. There are, however, numerous, perhaps more numerous, cases where the courts have upheld the transaction by applying a validating law and especially the law of the *forum*⁷⁴⁶.

The directly applicable rules of the *lex fori* have been applied as mentioned under (i) (1) above, wherever they have claimed to apply in the circumstances. Here the courts did not ask which was the proper law of the contract. On the other hand foreign statutes claiming application have very seldom been applied solely because they claimed application.

Private law rules – and to the extent to which they are not refused application – public law rules of foreign countries have mainly been applied when they belonged to the proper law of the contract. Thus the British courts, which let their own exchange control regulations govern those legal acts to which they claim to apply⁷⁴⁷ have applied foreign exchange control regulations if the issue was held to be covered by their intended scope of application and if they were part of the proper law of the transaction⁷⁴⁸.

Courts in countries which have enacted rules on the spatial application of the Hague Rules concerning Carriage of Goods by Sea without paying heed to the proper law of the bills of lading have applied foreign rules touching the same issue only where those rules formed part of the proper law of the bill of lading⁷⁴⁹. However, the Dutch Supreme Court declared *obiter* that in special circumstances Dutch courts would have to take into account mandatory rules enacted by a State other than that whose law governs the contract⁷⁵⁰.

(c) Critique

(i) General principles on the scope of mandatory rules on validity

Two principles apply and should apply both to private and public law rules affecting the validity of contracts.

(1) For a rule of law, be it domestic or foreign, to affect the validity of a contract it must claim application to the issue. This must

be manifest either from the wording of the provision itself or from a statutory interpretation of it. A court may find a statute, enacted for domestic purposes, to be unsuitable for international situations. The growing need for harmonization of international trade law may lead to a moderate and restrained interpretation of mandatory rules in some cases, see *infra* at (iii) (1).

(2) A court will always apply a mandatory rule of the *forum* country, which claims application to the issue, be it a public law rule such as an anti-trust, exchange control or a price law, or a private law rule such as the ones embodied in the Hague-Visby Rules concerning carriers' liability. Many such rules are applied by the courts of the enacting country only, and not by the courts of other countries. Their application will therefore depend upon where the action is brought. The conventions of the 1980s such as the Rome Convention (Article 7 (2)) and the Hague Conventions on Trusts, etc. (1984, Article 16 (1)), and on Sales (1985, Article 15) endorse this practice.

It causes *forum* shopping and uncertainty in international transactions⁷⁵¹. This, however, is difficult to avoid.

(ii) Private law rules

(1) Private law rules as part of the proper law

The rule that the legality or validity of a contract is determined by the proper law has led some authors to attack the doctrine of the proper law. The theory that the parties by choosing a proper law other than the law most closely connected with the contract can evade the mandatory provisions of that law will, they say, lead to the intolerable result that it is in the power of the parties to give validity to an agreement which otherwise would have been illegal and void (*supra*, (c) (i) (3)).

As far as rules of essential validity bearing a purely or preponderantly private law character are concerned this objection might be overcome. It has been suggested and is more and more widely accepted that party autonomy should be restricted in weak party contracts such as employment contracts, life and accident insurance, and consumer contracts, which in many countries are governed by significant mandatory rules. It has also been widely accepted that in dealing with these contracts the courts follow an objective and not a subjective method in determining the proper law when the

parties have not expressly designated that law. Following this approach the parties, or the powerful party dictating the terms of the contract, would not be able to evade the mandatory rules of the otherwise applicable law by selecting another law or by localizing the contract in another country (see *supra*, 2 (c) (iii)).

As for the "free" commercial contracts of international trade, such as commercial sales, hirings, agency and distributor agreements, transport insurance, re-insurance, and licensing contracts, any evasions, which in practice appear to have occurred only seldom so far, can be met by the rule that the choice of law be disregarded if made *mala fide*, i.e., with the purpose of evading the otherwise applicable law. In this field of private law the considerations in favour of party autonomy – predictability and need of freedom – will in general carry more weight than the policies behind the mandatory rules of private law of a certain country⁷⁵².

Where what may be described as rules of a private law character are concerned, the proper law of the contract should govern both the questions as to whether the contract is valid and enforceable and as to what are the effects, if it is invalid and unenforceable. The *forum* cannot help taking its own directly applicable rules into consideration, but there is no convincing tendency in practice⁷⁵³ and seldom any reason to apply foreign rules of private law which claim to apply. Application of the proper law is the best way in which to avoid a *dépeçage* of the contract (see *supra*, 1 (a)).

(2) Critique of the Rome Convention

The Rome Convention 1980 has only partly followed this approach. It puts a restriction upon party autonomy in some consumer contracts and individual employment contracts, see Articles 5 and 6. The artisan, the small farmer and fisherman, and the non-professional party who is not a consumer, are not afforded the protection provided in Article 5 nor is the weak "professional" party to a lease of an immovable property, a life and casualty insurance, and other contracts tainted with *dirigisme*. The only means to protect a weak party by the law of his habitual residence or another law closely connected with the contract is by application of Article 7. As Article 7 appears it may not give the weak party the protection he needs. Some countries will follow the example set by the Federal Republic of Germany (see Article 34 of the 1986 Act) and not enact Article 7 (1), and those who will are provided

with a rule the application of which will be uncertain. In private law matters the courts will probably apply Article 7 (1) with caution.

(iii) *Public law rules*

(1) *The State egotism*

Until recently the courts of the civil law countries showed a persistent State egotism in their application of public law rules. Domestic rules were applied and foreign rules were refused application irrespective of where the contract was localized.

In the main this attitude is preserved towards the public law rules of the *forum*. A court must apply a rule of the *forum* which claims application to the issue. This, however, may be a question of interpretation. A court may find a domestic statute unsuitable for international situations, and this should be a guide for the court's decision as to whether the statute claims application. Thus the French courts have interpreted domestic rules on the validity of gold clauses to be inapplicable to situations where the interests of international trade are involved⁷⁵⁴.

There is, however, a change of attitude going on towards foreign public law rules. The reasons for considering these rules inapplicable by their very nature has not been found convincing. To consider the States of the world to be in a state of perpetual competition is neither realistic nor desirable. The interdependence of the States and their need for mutual assistance in the furtherance of public policies go beyond the assistance agreed upon in international conventions and treaties. The rules treated here as public law rules regulate the relationship between private parties and many of these rules serve both private and public interests.

(2) *Foreign public law rules as part of the proper law*

Some authors⁷⁵⁵ have argued and some common law courts have held that foreign exchange control regulations must apply because they belong to the proper law. Civil and common law courts have applied foreign rules abrogating gold clauses when they formed part of the proper law of the contract, see *supra*, (b) (ii).

It is submitted here that the court should apply the economic legislation and other public law rules of the proper law of the contract. They should be disregarded when their application would violate a strong public policy of the *forum*, but even then it may

sometimes be necessary to take them into consideration⁷⁵⁶, see *infra*, (3).

(3) *Foreign public law rules not being part of the proper law*

It should not, however, be left for the parties to decide when foreign legislation of a public law character is to operate upon the contract. If this legislation were to be taken into account only when the law of the enacting country is the proper law, the parties might prevent its operation. In many instances it will be necessary or reasonable to consider foreign law even when it is not part of the proper law.

First: *The reasonableness test*. To define the exact circumstances under which foreign public law rules should be given effect is not easy. There is not much guidance to be found in the reported cases as the law seems to be in a process of development and therefore unsettled in most countries.

1. As mentioned under (i) a foreign prohibition should only be given effect if it claims application to the issue. This, however, does not mean that it should have the same effect upon the contract as provided in the foreign statute. In some cases the rule in question should be combined with the provisions of the proper law of the contract, see *supra*, 2 (c) (iii) (4), on the effect of a prohibition in the law of the place of performance.

2. Another requirement for taking a foreign prohibition into consideration is that the contract or the parties to it have a close connection with the legal system in question.

Foreign laws claiming to affect the validity of a contract should not be applied if the intended scope of the particular foreign law is "immodest" in the sense that it is not compatible with a reasonable scope of corresponding statutes of other countries. Such "long arm" statutes should not apply to situations which have no close connection to the enacting country, see Article 7 (1) of the Rome Convention.

Illustration (1). In May 1982 the Dutch Company S, Nederland, which is a wholly owned subsidiary of an American corporation undertakes to deliver "strings of geophones" produced in the Netherlands to the French Company C. The strings are to be resold by C to the USSR to serve as equipment for the pipeline planned to connect Siberia and West Europe. On 22 June 1982 the United

States Government imposes an embargo on such goods. The embargo is directed, *inter alia*, to all subsidiaries of United States corporations resident outside the United States.

S refuses to deliver the strings invoking *force majeure*. C brings an action against S in a Dutch court claiming specific performance. The court finds the contract to be governed by Dutch law, and refuses to consider the American embargo which, in so far as it is directed to subsidiaries of United States corporations resident outside the United States and concerns goods produced outside the United States, violates public international law.

The court directs S to perform the contract⁷⁵⁷.

3. Finally, the application of the foreign prohibition must be cogent or reasonable.

There may be a cogent reason to pay heed to the foreign rule when the authorities of the enacting country have it in their factual power to enforce the statute against one of the parties.

It will be reasonable to take the foreign provision into consideration as "an act of comity" when for instance, the economy of the enacting country is directly affected by the agreement and when corresponding provisions of other countries generally claim to apply when similar agreements affect the economy of their countries. The present writer adheres to the view of Zweigert that heed should be paid to an intended scope of operation of a foreign economic measure if this is reasonable from an international point of view⁷⁵⁸.

Often the application of a foreign statute will be both cogent and reasonable.

Illustration (2). A promises B to abide by resale prices fixed by B when selling the products of B in X country where A has his place of business. Resale price maintenance clauses are illegal and unenforceable under the law of X. The courts of Y in which B has his place of business should not enforce the clause against A even if such a clause would be lawful under the laws of Y. The authorities of X will most likely have it in their power to interfere with the resale price maintenance agreement and it seems reasonable that the statute of X should be applied to an agreement having a direct effect on business in X.

Necessity, however, may force the court to take a foreign prohibition into consideration even if its application does not seem reasonable. It may be necessary to pay heed to trading with the

enemy legislation of a country or to a measure interfering with a contractual right when the factual power of the enacting country cannot be disregarded⁷⁵⁹. When thus necessity and not "comity" persuades a court to apply the foreign statute the court will restrict its application as far as possible.

Illustration (3). Alfa Company of country X doing business in country Y issues bonds in country X and country Y which are governed by the law of Y and payable in Y in Y currency only. Later an act of country X obliges bond debtors to repay their debts in country X and in X currency irrespective of whether their debts were expressed in the currency of X or Y. The courts of country Y should, it is submitted, take the legislation in X into account where claims for payment in the currency of Y are presented by bondholders domiciled in X, but not, if by bondholders in other countries. Even if the courts of Y ordered the debts of the Alfa Company to bondholders living in country X to be paid in the currency of Y, the authorities of X could probably force these bondholders to accept payment in the currency of X.

There are also cases where it would be reasonable to take invalidating provisions and prohibitions of another country into consideration even if the authorities of the enacting country will probably lack the power to enforce the provisions against the parties⁷⁶⁰.

Illustration (4). A number of enterprises of country Y which dominate the regional market of a certain product agree to refuse to sell the product to co-operatives in country X. The courts of country Y, the cartel laws of which do not apply to the agreement, should, it is submitted, take into consideration that this agreement affecting market conditions in X is illegal under X law and should refuse to enforce it in proceedings against an enterprise of Y which has broken it.

If under similar circumstances an agreement was made abroad affecting market conditions in Y the authorities of Y would, if they could, take action against it, but the cartel authorities and the courts of Y might be unable, as were those of X, to break up such an agreement and could need the help of a foreign authority.

Likewise exchange control regulations which, unlike the exorbitant measure⁷⁶¹ concerning the bonds described *supra* (Illustration 3) are not unusual among the nations, should be applied not only when they belong to the proper law of the contract but also when

they form part of the legal system the currency reserves of which are affected by the agreement⁷⁶².

Article 7 (1) of the Rome Convention should, it is submitted, be interpreted in accordance with these suggestions. Article 7 leaves the parties with a considerable amount of uncertainty. As far as private law rules are concerned this uncertainty is not warranted, see (ii), *supra*. However, the choice of law rules governing public laws are in a process of development. Authors, legislators and courts have recently begun to move away from national egotism. Rules in development seldom offer a high degree of certainty. The uncertainty is the price to be paid for what is considered to be a move towards a desirable goal⁷⁶³.

NOTES

Abbreviations used in the notes and in the Bibliography

AfS=Arkiv for sjörett; AG=Amtsgericht (West Ger.); AP=Nachschlagewerk des Bundesarbeitsgerichts. *Arbeitsrechtliche Praxis*; ArbRSamml.=Entscheidungen des Reichsarbeitsgerichts und der Landesarbeitsgerichte. Arbeitsrechtsammlung; AWD= Aussenwirtschaftsdienst des Betriebsberaters; BayObLGZ=Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen; BB=Der Betriebsberater; BG=Bundesgericht/Tribunal federal (TF) (Switz.); BGB=Bürgerliches Gesetzbuch (West Ger.); Cass.=Corte (Suprema) di Cassazione (Italy); Cour de cassation; CC=Civil Code, Code civil; CCI=Chambre de commerce internationale/International Chamber of Commerce (ICC); cert.den.=certiorari denied; CISG=The United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980); *Clunet*=*Journal du droit international privé et de la jurisprudence comparée. Journal du droit international privé* (founded by Clunet); *C.M.L.Rev.*=*Common Market Law Review*; DB=Der Betrieb; D.L.R.=Dominion Law Reports; D.M.F.=Le droit maritime français; Dz.U.=Dziennik ustaw Polskiej Rzeczypospolitej Ludowej; EGBGB=Einführungsgesetz zum Bürgerlichen Gesetzbuch (West Ger.); EuCJ=European Court of Justice/Cour de justice des Communautés européennes (CJCE); GRUR Ausl.=Gewerblicher Rechtsschutz und Urheberrecht. Auslands- und internationaler Teil; H=Højesteret (Den.); HansRGZ=Hanseatische Rechts- und Gerichtszeitschrift; HD=Högsta Domstolen (Swed.); Højesteret (Den.); Høyesterett (Nor.); HGB=Handelsgesetzbuch; H.R.=Hoge Raad (Neth.); ICC=International Chamber of Commerce/Chambre de commerce internationale (CCI); *ICLQ*=*International and Comparative Law Quarterly*; Introd. LawCC=Introductory Law to the Civil Code (West Ger.); *IPRspr.*=*Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts*; *IzRspr.*=*Sammlung der deutschen Entscheidungen zum interzonalen Privatrecht*; *J.Bus.L.*=*The Journal of Business Law*; *JO*=*Journal officiel*; *JOCE*=*Journal officiel des Communautés européennes*; JW=Juristische Wochenschrift; KG=Kammergericht Berlin (West Ger.); L.ed.; L.Ed. 2d=Lawyers' Edition, United States Supreme Court Reports; Lawyers' Edition, United States Supreme Court Reports, Second Series; LM=Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshofes; *LNTS*=*League of Nations Treaty Series*; MDR=Monatsschrift für Deutsches Recht; N.D.=Nordisk domssamling; (District Court for the) Northern District ... (USA); NDS=Nordiske domme i sjøfartsanliggender; N.J.A.=Nytt juridisk arkiv; NJW=Neue Juristische Wochenschrift; NRT.=Norsk retstidende (Oslo); *N.T.I.R.*=*Nederlands tijdschrift voor internationaal recht*; *NTIR*=*Nordisk tidsskrift for international ret* (og Jus Gentium) (Copenhagen); *OJEC*=*Official Journal of the European Communities*; ØL=Østre Landsret (Den.); ØLD= Østre Landsretsdomme (Den.); OR=Obligationenrecht/Code des obligations (CO) (Switz.); *RabelsZ*=*Rabels Zeitschrift für ausländisches und internationales Privatrecht*; *Recueil*=*Recueil de la jurisprudence de la Cour*, Cour de justice des Communautés Européennes; RepRC=Report on the Convention on the Law Applicable to Contractual Obligations by M. Guilianno and P. Lagarde (1980), *OJEC*, No. C 282/1, 31.10.1980, cited Rep. RC; *Rev.crit.d.i.p.*=*Revue critique de droit international privé*; RIW/AWD=Recht der internationalen Wirtschaft. Aussenwirtschaftsdienst des Betriebsberaters (Heidelberg); Sb.=Sbirka zákonu Československé socialistické republiky (Republiky Československé); Scand.Stud.=Scandinavian Studies in Law; SOU=Statens Offentliga Utredningar (Swedish

Government Reports); Sv.HD=Sveriges Högsta Domstol (Swed.); SvJT=*Svensk juristtidning*; TfR=Tidsskrift for rettsvitenskap (Oslo); UCC=Uniform Commercial Code (USA); UfR=Ugeskrift for Retsvæsen; ULIS=Uniform Law on International Sales; ULFIS=Uniform Law on the Formation of International Sales; VL=Vestre Landsret (Den.); VLD=Vestre Landsretsdomme (Den.); WGO=WGO-Monatshefte für Osteuropäisches Recht; ZHR=*Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (und Konkursrecht); ZPO=Zivilprozessordnung (Austria; Ger.).

1. An earlier presentation of the topic is found in my contribution to the *International Encyclopedia of Comparative Law*, Vol. III, Private International Law (Chief Editor Kurt Lipstein), Chapter 24, Contracts, which was completed in 1974 and published in 1976. Material from that contribution has been included in the present lectures.

2. When not otherwise indicated, statutes which are cited here are to be found in Makarov.

3. Swiss: coupure générale, see BG, 12 February 1952, BGE, 78 II, 74; French: morcellement, see Batiffol, *Contrats*, No. 360.

4. Swiss: coupure spéciale; German: Spaltung, see Neuhaus, 135.

5. von Savigny, 28, 200, 208.

6. Batiffol, *Contrats*, No. 45.

7. E.g., von Savigny, 23-30; Rabel (-Drobnig), *Conflict*, I, 94.

8. E.g., Niboyet, *Cours*, 408, 410; Currie.

9. See Batiffol, *Contrats*, No. 19 and Lipstein, "The General Principles of Private International Law", *Collected Courses* 135 (1972-I), 106, nn. 13, 14.

10. Si fundus venierit ex consuetudine ejus regionis, in qua negotium gestum est, pro evictione caveri oportet.

11. Contraxisse unusquisque in eo loco intellegitur, in quo ut solveret se obligavit.

12. Batiffol, *Contrats*, No. 21.

13. By von Bar, II, 12.

14. Gamillscheg, *Einfluss*, 55.

15. Aut quaeris de his quae oriuntur secundum ipsius contractus naturam tempore contractus (see Lainé, I, 138).

16. Aut de his quae oriuntur ex postfacto propter negligentiam aut moram (see Lainé, I, 135).

17. On Burgundus and Boullenois, see Batiffol, *Contrats*, No. 28.

18. See, for instance, Paulus de Castro (fifteenth century), here quoted from Lainé, I, 189: Quia talis contractus dicitur ibi nasci ubi nascitur (according to Gamillscheg: pascitur) et sicut persona ratione originis ligatur a statutis loci originis, ita et actus.

19. See Batiffol, *Contrats*, No. 27.

20. See Gamillscheg, *Einfluss*, 26, on Dumoulin's Commentarius in codicem sacratissimi et consuetudinibus localibus.

21. Cited from Gamillscheg, *Einfluss*, 26.

22. Jus est in tacita et verisimiliter mente contrahentium (see Lainé, I, 228).

23. See, for instance, Weiss, 362.

24. Aut statutum loquitur de his quae pendent a voluntate partium; see Gamillscheg, *Einfluss*, 32 and 113, and Niboyet, *L'autonomie* 9; Batiffol, *Contrats*, No. 26.

25. Aut statutum disponit in his quae non pendent a voluntate partium sed a sola potestate legis.

26. See for the unabridged Latin text: Lorenzen, 162.

27. Verum tamen non praecise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus.

28. Austrian CC (1811), paras. 36 and 37, now repealed.
29. See, for instance, Boullenois, *Traité de la personnalité et de la réalité des lois* (Paris, 1766), 57.
30. 91 U.S. 406, 411 (1875).
31. E.g., *Scott v. Pilkington* (1862), 2 B. & S. 11.
32. 142 U.S. 116 (1891), see *infra*, 3 (b) (iii) (2).
33. See the survey in Scoles and Hay, 666 ff.
34. Beale II, 1090; Restatement (1934), s. 332.
35. Beale II, 1259; Restatement (1934), ss. 355-376, esp. ss. 358 and 372.
36. Restatement (1934), s. 332, comment c.
37. BG, 9 June 1906, BGE, 32 II 415; see Moser, 20.
38. 29 F.373 (S.D.N.Y., 1886).
39. *Ibidem*, 386.
40. 280 N.Y. 135, 19 N.E.2d 992 (1939).
41. Rabel (-Drobnig), *Conflict* II, 450; Cook, 360; Lorenzen, 261, 316; Ehrenzweig, *Treatise* 454, also criticized the distinction made by the Restatement (1934). He himself relied on two basic rules, the rule of validation governing questions of validity and the rule of the *lex fori* governing questions of performance. One may question, however, whether this distinction is very much clearer than that of the Restatement (1934) which Ehrenzweig blamed for its lack of clarity. Weintraub, 348 f. and 394 f. makes a distinction between validity and construction.
42. Restatement 2d, Tentative Draft No. 6 (1960), 5. The subsequent proposed official draft 1968 and the Restatement 2d (1971), however, put emphasis on the issue and not on the contract, see on this, *infra* (vi).
43. BG, 12 February 1952, BGE, 78 II 74 (*Chevalley* case).
44. Cavers, *Choice-of-Law Process*; on Currie, see Hay and Scoles, 657 f.
45. Restatement 2d (1971), s. 188, comment d, p. 233.
46. Restatement 2d (1971), s. 6 with comments; see Leflar, Chap. 11, p. 233.
47. Restatement 2d (1971), s. 188, comment b.
48. Von Mehren and Trautman do not seem to oppose a *dépeçage*. However, "for questions of validity, effect, and interpretation, perhaps because these issues reach, as it were, to the essence of contract, a system committed to the use of a single connecting factor for contracts will feel most comfortable in using that connecting factor", see *idem*, 189.
49. The governmental analysis test may lead to the application of two different laws to the same relationship when two issues are involved in the same case. These issues may relate to two different claims under the same contract, e.g., a claim for specific performance and a claim for damages, or they may relate to the same claim, e.g., for damages. In the latter case Currie would apply one law only. You "cannot put together half a donkey and half a horse and ride to victory on the synthetic hybrid". What Currie would do if the two issues were related to two different claims, we do not learn; see Currie in Cavers, *Choice-of-Law Process*, 39.
50. Restatement 2d (1971), para. 6 (2) (b), (c), (e), (g).
51. See *infra*, 3 (b) (ii) (1).
52. Czechoslovak Act on Private International Law of 4 December 1963 (Statutory PIL 261, French transl.: *Rev.crit.d.i.p.*, 1965, 614), s. 4; Polish Act on Private International Law of 12 November 1965 (Statutory PIL 295, French transl.: *Rev.crit.d.i.p.* 1966, 323), Arts. 25-30; Portuguese CC Arts. 35-40; East German Law on the Application of Law to International Relationships of Civil, Family and Labour Law and to International Economic Contracts of 5 December 1975 (GBL, I, 748), s. 12, cf. ss. 14, 16 and 28. Hungarian Law-Ordinance No. 13/1979, s. 30 (German Transl. in *Das Ständesamt*, 1980, 78); Yugoslav Act of 15 July 1982, No. 43, Arts. 19-22 (English transl. in *NILR*, 1983, 222); Turkish Act on Private International Law of

22 May 1982 s. 24 (French transl. in *Rev.crit.d.i.p.*, 1983, 141); Peruvian CC of 24 July 1984, Arts. 2095, 2096 and 2099 (Codigo Civil, Edicion Oficial, Lima, 1984).

53. Lunz, *IPR*, II, 144.

54. *OJEC*, No. L 266, 9 October 1980 (80/934 EEC).

55. Art. 7 (1) of the Hague Sales Convention 1985 has a similar provision.

56. Rep. RC., 282/17.

57. Rep. RC, 282/23.

58. See Lando, *IECL*, ss. 177-231.

59. von Savigny, 202.

60. von Bar, II, 15.

61. See, for instance, OAG, Lübeck, 26 March 1861. SeuffA 15, No. 183, and OAG, Rostock, 3 November 1862, SeuffA 19, No. 5.

62. Deuntzer, Kort Fremstilling af Retssystemets, navnlig Privatrettens almindelige Del (Copenhagen, 1879), 101, 103; Almén (ed. 2), 50.

63. Søl- og Handelsretten, Copenhagen, 22 September 1914, UfR, 1915 A., 9.

64. See Vischer, *Vertragsrecht*, 95; BG, 22 February 1949, *Schw.Jb.Int. R.* 5 (1948), 115, ends the "petite coupure" as the splitting of the contract was called, see also Message, 1982, 144.

65. CC ss. 269, 270; see also Swiss CO, Art. 74.

66. CCProc., ss. 12, 13, see also Zürich CCProc. (13 April 1913), s. 1.

67. Almén (ed. 2), 50.

68. See Drobnig, 240, 241.

69. See Lando, *Kontraktstatuttet*, 208, and Danish HD, 22 May 1940, UfR, 1940, A, 652.

70. Batiffol and Lagarde, II, 315, No. 595.

71. Dicey and Morris (-Morris) (ed. 10), 749.

72. See Batiffol, *Contrats*, No. 90.

73. Czechoslovak Act on Private International Law 1963 (*supra*, n. 52), ss. 4, 9-12; Polish Act on Private International Law 1965 (*ibidem*), Arts. 25-30; see also Lunz, *IPR*, II, 144.

74. Nussbaum, *IPR*, 207 (unerträgliche Künsteleien).

75. von Bar, II, 16; Almén (ed. 2), 50.

76. Haudek, 2.

77. England: Dicey and Morris (-Collins) (ed. 10), 758; Cheshire and North (ed. 10), 202. Scandinavia: Philip, *Dansk* 312, but see Siesby, 120 ff. Nial, *Förmögenhetsrätt* II; Bogdan, 209. Switzerland: Vischer, *Vertragsrecht* 21. United States: Restatement 2d (1971), s. 187 (1) and (2). Netherlands: Deelen, 302, and Hoge Raad, 13 May 1966, *N.J.* 1967, No. 3.

78. German: Kollisionsrechtliche Parteiverweisung, see Haudek, 4.

79. German: Materiellrechtliche Parteiverweisung, see Haudek, 3; see also Dicey and Morris (-Collins) (ed. 10), 758.

80. See Restatement 2d (1971), para. 187; "(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could not 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..."; see also Scoles and Hay, 650.

81. E.g., Rabel (-Drobnig), *Conflict* II, 363; Siesby, 120 f.

82. See Wolff, *PIL*, 417, citing the old English decision in *Foubert v. Turst*, 1 Brown Parl.Cas. 129, 1 E.R. 464 (1703); Philip, *Dansk*, 313.

83. (1760) 1 W.Bl. 257, 258, 96 E.R. 141.

84. Ørsted, 9.

85. E.g., von Savigny, 248; Story (ed. 5), 396; Kent, 458.

86. E.g., Cass. civ., 22 March 1806, S. 1806.I.228.
87. E.g., OAG, Lübeck, 31 January 1857, Seuffa 2, No. 5; OAG, Lübeck, 15 January 1858, ZHR, 2 (1858), 141.
88. *Carnegie v. Morrison*, 43 Mass. (2 Met.), 381 (1841).
89. (1865) 3 Moo.P.C. (N.S.), 272, 291, 16 E.R. 103, 110.
90. (1865) L.R. 1 Q.B.115.
91. See Story (ed. 3), 368 and 395.
92. 3 Moo. P.C. (N.S.), 272, 290-291, 16 E.R. 103, 110.
93. Story (ed. 3), 368, 395.
94. *Supra*, n. 89, 16 E.R. at 120-121.
95. (1889) 42 Ch.D. 321 (C.A.).
96. See the judgment of Lord Halsbury, *ibidem*, p. 336.
97. See on this Graveson, 406.
98. See, e.g., Westlake (ed. 4), 5, 301.
99. Dicey, *The Conflict of Laws* (London, 1896), 5, 540, 57.
100. *Idem*, 762.
101. Dicey and Morris (-Collins) (ed. 10), Rule 145, Subrule 1, 753, citing, *inter alia*, *Hamlyn v. Talisker Distillery*, (1894) A.C. 202 (H.L.); *Vita Food Products Inc. v. Unus Shipping Co., Ltd.*, (1939) A.C. 277 (P.C.); *Re Helbert Wagg & Co., Ltd.'s Claim*, (1956) Ch. 323; *Whitworth Street Estates Ltd. v. James Miller & Partners Ltd.*, (1970) A.C.583.
102. (1939) A.C. 277 (P.C.).
103. *Idem*, 290.
104. See also *Getreide-Import-Gesellschaft m.b.H. v. Contimar S.A.*, (1953) 1 W.L.R. 793 (C.A.).
105. See Dicey and Morris (-Collins) (ed. 10), 755, citing *Golden Acres v. Queensland Estates, Ltd.*, (1969) St.R.Qd.378; *Queensland Estates, Ltd.*, v. *Collas*, (1971) St.R.Qd. 75; *Boissevain v. Weil*, (1949) 1 K.B. 482 (C.A.) at 491, per Denning, L.J., and *Re Helbert Wagg & Co., Ltd.'s Claim*, (1956) Ch. 323 at 341 per Upjohn.
106. Cheshire (ed. 5), 205-208, (ed. 6), 213-217, but see Cheshire and North (ed. 10), 201.
107. See Morris, *Proper Law*, 197-207, and *idem*, *Conflict*, 219 and 225.
108. Westlake (ed. 5), 305.
109. Dicey and Morris (-Collins) (ed. 10), 755, 757. In *Rossano v. Manufacturers' Life Insurance Co.*, (1963) 2 Q.B. 352, McNair, J. said that "the test is not with what country the transaction has the closest and most real connection but what intention as to the proper law is to be imputed to the parties as to the system of law by reference to which the contract was made or with which it had its closest and most real connection". By this — as it seems rather cryptic — statement a contract which had its closest local contacts to Egypt and its indications of intention pointing to Canada was held to be governed by Canadian law and the Egyptian currency restrictions were not applied.
110. Dicey and Morris (-Collins) (ed. 10), 757, see also Graveson, 410. And see *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.*, (1971) A.C. 572 (H.L.).
111. On labour contracts see *Sayers v. International Drilling Company N.V.*, (1971) 1 W.L.R. 1176 (C.A.). Kahn-Freund, "United Kingdom of Great Britain and Northern Ireland", in *Actes du Deuxième Congrès International de Droit du Travail*, 1957 (Geneva, 1961), 483 ff. On insurance contracts see *Hamlyn & Co. v. Talisker Distillery*, (1894) A.C. 202 (H.L.); *Spurrier v. La Cloche*, (1902) A.C. 446 (P.C.); *Rossano v. Manufacturers' Life Insurance Co.*, (1963) 2 Q.B. 352.
112. See s. 56 (2). A contract for international sale of goods is defined as in the Uniform Law of International Sale of Goods (Ministère de la Justice des Pays-Bas (ed.), Conférence diplomatique sur l'Unification du droit en

matière de la vente internationale. *Actes et Documents I* (The Hague, 1966) (with English text, 333), Art. I).

113. See Anton, 184-192.

114. For Canadian, Australian and New Zealand cases, see Dicey and Morris (-Collins), 753, n. 36 and Nygh 214.

115. Cass. civ., 5 December 1910, S. 1911.1.129.

116. Mailher de Chassat, *Traité des statuts* (Paris, 1841), 54.

117. See, e.g., Pillet and Niboyet, 582; Pillet, *Principes*, 429.

118. Cass. civ., 19 February 1930 and 27 January 1931, S. 1933.1.41.

119. See Batiffol, *Contrats et Conventions*, No. 5, and Loussouarn and Bredin, 593.

120. E.g., Germany: Raape, *IPR*, 461; Switzerland: Moser, 195; Denmark: Hjele, 137; see also *infra*, (c) (ii).

121. France: Loussouarn and Bredin, 592-595; England: Cheshire and North (ed. 10), 197; Sweden: Michaeli, 284.

122. Batiffol, *Contrats*, No. 46.

123. *Idem*, Nos. 6 and 7.

124. *Idem*, No. 45.

125. Batiffol, *Mélanges Maury*, 48; *idem*, and Lagarde, II, No. 576.

126. Batiffol and Lagarde, II, No. 576, where the authors invoke (p. 280): "la conception moderne du rôle de l'Etat, luttant contre les inégalités sociales et intervenant dans les complexités de l'économie contemporaine" (the modern notion of the function of the State fighting against social inequality and intervening in the complexities of the contemporary economy).

127. *Idem*, II, No. 571.

128. Donnedieu de Vabres, 267.

129. Lerebours-Pigeonnière (ed. 9), Nos. 478, 653, and Mayer, No. 680 ff., criticizing Batiffol's theory.

130. See Cass. civ. 5 December 1910, S.1911.1.129 and subsequently Cass. civ., 28 June 1966, *Rev.crit.d.i.p.*, 1967, 334; 23 April 1969, *Rev.crit.d.i.p.*, 1969, 717; Cour Amiens, 9 April 1968, *Rev.crit.d.i.p.*, 1970, 448; Cour Paris, 22 December 1983, *Rev.crit.d.i.p.*, 1984, 484.

131. Makarov, II, No. 222.

132. Cass. civ., 19 February 1930 and 27 January 1931, S. 1933.1.41.

133. See Batiffol, *Contrats et Conventions*, Nos. 31-34.

134. Batiffol, *ibidem*, No. 33; *idem* and Lagarde, II, No. 575.

135. E.g., Cass. civ., 5 March 1969, *Rev.crit.d.i.p.*, 1970, 279. On labour contracts see Gamillscheg, *IECL*, Vol. III, Ch. 28, ss. 11 and 24.

136. Batiffol, *Contrats et Conventions*, Nos. 18-24.

137. Cass., 24 February 1938, *Rev.crit.d.i.p.*, 1938, 661, 662; see Rigaux, II, No. 1118. Van Hecke 74; Vander Elst and Weser, 141.

138. Rigaux, II, No. 1120.

139. See on Cass., 21 February 1975 (J.T. (1975) 424), *idem*, No. 1123.

140. *Idem*, No. 1121 ff., Vander Elst and Weser, 149. Van Hecke 73.

141. Rigaux, No. 1144, Vander Elst and Weser, 186.

142. Hoge Raad, 12 December 1947, N.J. 1948, No. 608. Sauveplanne 55.

143. Hoge Raad, 13 May 1966, N.J. 1967, No. 3.

144. The translation of the *Alnati* case is that submitted by Deelen in *NTIR*, 15 (1968), 86, together with his comments on the case.

145. See also Hoge Raad, 1 July 1977, *NILR*, 1980, 378.

146. Deelen, *supra*, n. 144 and comment, Struycken, *Rev.crit.d.i.p.*, 1967, 522, 523, see also Sauveplanne, 56.

147. von Savigny, 248; von Bar, II, 4, 5; Zitelmann, II, 373-374; Franckenstein, *Internationales Privatrecht*, II (Berlin, 1928), 123.

148. ROHG, 9 December 1895, ROHG, 19, 132; RG, 22 February 1881, RGZ 4, 242.

149. Haudek, 5.

150. Wolff, *IPR* (1933), 84; Nussbaum, *IPR*, 214; Raape, *IPR*, II, 249.
151. Wolff, *IPR* (1933), 86.
152. Raape, *IPR*, II, 252.
153. Wolff, *PIL*, 417-420; *idem*, *IPR* (1954), 139.
154. Raape, *IPR*, 460.
155. Gamillscheg, *Rechtswahl*, 332.
156. *Ibidem*, 303; *idem*, *Arbeitsrecht*, 113; see also *idem*, *IECL*, Vol. III, Ch. 28, ss. 43-47.
157. *Idem*, *Rechtswahl*, 308-312.
158. *Idem*, *Arbeitsrecht*, 187.
159. See MünchKomm (-Martiny) Vor art. 12 EGBGB, Nos. 6, 12, 13, Neuhaus, 251, 258, Drobnig, 226, Kegel, 290.
160. LAG, Munich, 16 May 1950, *IPRspr.* 1950/51, No. 21; LAG, Bremen, 18 April 1951, *IPRspr.* 1945/53, No. 179.
161. E.g., BAG, 20 July 1967, *IPRspr.* 1966/67, No. 50; BAG, 18 December 1967, *IPRspr.* 1966/67, No. 52; see also Gamillscheg, *IECL*, Vol. III, Ch. 28, s. 8.
162. See Introd. Law CC, Art. 30 (repealed, see Introd. Law as amended by the Law on a New Enactment of Private International Law of 25 July 1986, Arts. 6 and 34).
163. Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen (AGB-Gesetz) of 9 December 1976 (BGBl. I, 3317).
164. "Wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen."
165. Gesetz zur Neuregelung des Internationalen Privatrechts vom 25 July 1986, BGBl. 1986 I, 1142. See on the Government Bill of 20 May 1953, *RabelsZ*, 1983, 595 (Opinion of the Max-Planck Institut für ausländisches und internationales Privatrecht (MPI)), and 691 (Texts of the Bill and the draft law proposed by the MPI).
166. *Idem*, 668.
167. See Moser, 11. The Swiss Federal Tribunal was set up in 1874.
168. See Aubert, "Les contrats internationaux dans la doctrine et la jurisprudence", *Rev. crit. d.i.p.*, 1962, 22.
169. BG, 9 June 1906, BGE, 32 II, 415; Moser, 20.
170. Moser, 190 and 206, and authors cited by him.
171. BG, 12 February 1952, BGE, 78 II 74 (*Chevalley* case) and BG, 31 August 1953, BGE, 79 II 295.
172. BG, 23 March 1965, BGE, 91 II 44.
173. *Ibidem*, 51. See on this decision *infra*, (c) (iii) (2).
174. See Message, 1982, 34 (on Art. 1), 141 (Art. 113), 148 (Art. 117) and 148 (Art. 118). The articles are on pages 203 ff.
175. Austrian BGBl, 1978, No. 304, see Beitzke in *RabelsZ*, 1979, 246 ff. and Schwimann.
176. See the *obiter dictum* in *Wayman v. Southard*, 10 Wheat. (23 U.S.), 1, 6 L.Ed., 253 (1825).
177. Story (ed. 3), 368 and 395; see also Yntema, "Contract and Conflict of Laws", 1 *N.Y.L.F.* 46 (1955).
178. Beale, II, 1171-1174; see *Pritchard v. Norton*, 106 U.S. 124 (1882).
179. See, e.g., *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 71 L.Ed. 1123, 47 S.Ct. 626 (1927), and *Blackford v. Commercial Credit Corp.*, 263 F.2d 97 (5 Cir. 1959).
180. Beale, II, 1079-1086.
181. Quoted from *Carnegie v. Morrison*, 43 Mass. (2 Met.), 381, 396 (1841); see Beale, II, 1099.
182. Beale, II, 1085.
183. E.g., *Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2 Cir. 1931).
184. 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953).

185. 221 F.2d 189, 195 (2 Cir. 1955).
186. 151 F.Supp. 465 (S.D.N.Y. 1957).
187. E.g., *Seeman v. Philadelphia Warehouse Co.*, *supra*, n. 179 at 408; *Owens v. Hagenbeck-Wallace Shows Co.*, 192 A. 158, 164 and 464 (R.I. 1937).
188. *Lauritzen v. Larsen*, *supra*, n.184 at 589.
189. See Scoles and Hay, 637 ff.
190. For cases concerning insurance, see: *New York Life Ins. Co. v. Gravens*, 178 U.S. 389 (1900); *Mutual Life Ins. Co. of New York v. Hathaway*, 106 F. 815 (9 Cir. 1901); *Ragsdale v. Brotherhood of Railroad Trainmen*, 80 S.W.2d 272 (Mo. 1934); *New England Mut. Life Ins. Co. of Boston, Mass. v. Olin*, 114 F.2d 131 (7 Cir. 1940), cert. den. 312 U.S. 686 (1940); *Mutual Life Ins. Co. v. Mullen*, 69 A. 385 (Md. 1908); *Jones v. New York Life Ins. Co.*, 32 Okl. 339, 122 P.702 (1912). See also Carnahan, 290.
191. See on insurance cases also Scoles and Hay, 641.
192. See on this trend, Batiffol, *Contrats*, No. 322 and No. 341; Carnahan, 290, and Rabel (-Bernstein), *Conflict*, III, 319-335.
193. See Restatement 2d (1971), 193.
194. Griese, "Marine Insurance Contracts in the Conflicts of Laws - a Comparative Study of the Case Law", 6 *UCLA L.Rev.* 55 (1958/59), concluded (83): "In American law the parties can without restrictions agree on the application of English marine insurance law; they can only agree on another law, it seems, if it has at least a substantial connection with the contract . . .".
195. 294 U.S. 532 (1935). It was an appeal to the United States Supreme Court under the Judicial Code (28 U.S.C.A., s. 344), s. 237.
196. *Alaska Packers Association v. Industrial Accident Commission of California*, 1 Cal. 2d 250, 34 P.2d 716 (1934).
197. Employment: *Owens v. Hagenbeck-Wallace Shows Co.*, *supra* (2); Life Insurance: *New York Life Ins. Co. v. Gravens*, 178 U.S. 389 (1900); *New England Life Ins. Co. v. Olin*, 114 F.2d 131 (7 Cir. 1940), cert. den. 312 U.S. 686 (1941); Fire, Surety or Casualty Insurance (apart from Marine Insurance): *Johnston v. Commercial Travelers Mutual Acc. Assn.*, 242 S.C. 387, 131 S.E.2d 91 (1963); Marine Insurance: see cases cited by Griese (*supra* (3)); see also *Lummus Co. v. Commonwealth Oil Refining Co.*, 280 F.2d 915, 924 (1 Cir. 1960) (contract to build an oil refinery); and for contracts for the sale of goods UCC, ss. 1-105.
198. E.g., *Owens v. Hagenbeck-Wallace Shows Co.*, *supra*, n. 187.
199. Restatement 2d (1971), s. 187, comment g.
200. See *idem* s. 187 (2) (a) and comment f.
201. In s. 187 comment b it is said that a choice of law agreement which has been obtained by improper means will not be upheld. "A factor which the forum may consider is whether the choice-of-law provision is contained in an 'adhesion' contract . . .".
202. See Restatement 2d (1971), ss. 189-191 and 194-197.
203. *Ibidem*, s. 192, comment e.
204. *Ibidem*, comment c.
205. *Ibidem*, comment e.
206. *Ibidem*, comment h.
207. *Ibidem*, s. 193, comment e.
208. *Ibidem*.
209. *Idem*, ss. 195, 196, but see Weintraub, 375, 383, and Ehrenzweig, *Treatise*, 454.
210. Uniform Commercial Code. 1962 Official Text with Comments (Philadelphia and Chicago 1962), s. 1-105, comment i.
211. "Unconscionable" choice-of-law clauses may probably be held invalid under UCC, s. 2-302, see Weintraub, 361 and Scoles and Hay, 651.
212. UCC, ss. 4-102, 6-102, 8-106, 9-102, and 9-103.

213. For instance, the opinions in HD, 19 June 1925, UfR, 1925, A 839, and in HD, 13. December 1934, UfR, 1935, A 82. In Denmark the deliberations of the Supreme Court are held in closed session but are recorded by two clerks. The opinions expressed during these deliberations are accessible to the legal profession by special permission which is granted not earlier than about 20 years after the judgment.

214. See Lov om gennemførelse af konventionen om, hvilken lov der skal anvendes på kontraktlige forpligtelser m.v. of 9 May 1984. See Karnov's *Lovsamling*, 10. ed., 1982, supplement 1984, p. 6077.

215. HD, 8 December 1937, *NRt.*, 1937, 888.

216. HD, 17 November 1956, *NRt.*, 1956, 1172.

217. Byrett, Oslo, 22 September 1949, *NDS*, 1949, 409.

218. HD, 30 January 1937, *NJA*, 1937, 1.

219. HD, 30 January 1937, *NJA*, 1937, 17 (the *Bergstedt* case).

220. See Svea Hovrätt, 20 January 1948, *NDS*, 1948, 379.

221. See the *Bergstedt* case, *supra*, n. 217.

222. Gaarder, 100.

223. Nial, Förmögenhetsrätt, 9; Eek, *Swedish Conflict*, 266, and *idem*, *Exporträtt* 45, Bogdan, 206.

224. See Eek, *Exporträtt*, 48. Pålsson in *NTfiR*, 1980, 160, but see Bogdan, 206.

225. Case No. 11/1973, reported by Bernitz in *SvJT*, 1974, 115 f.

226. SOU, 1977: 84, 179.

227. Bogdan, 207 with n. 5.

228. See the decision of the Maritime Arbitration Commission of the USSR in the case of *S/S Phoenix* (1936), *Vsesoiuznaia torgovaia palata* (ed.), *Sbornik reshenii Moskovskoi arbitrazhnoi komissii pri Vsesoiuznoi torgovoi palata za 1936 g III* (Moscow and Leningrad, 1937), 143, and see Pisar, "Soviet Conflict of Laws in International Commercial and Maritime Cases", 70 *Harv.L.Rev.* 593, 630 (1956/57).

229. Ramsaiziev, 19, 43; Lunz, *IPR*, II, 135; Boguslavski, II, 16.

230. On the views of the authors see Lunz in his *Private International Law* (Russian ed., 1949), 211 (here citation from Pisar, *supra*, n. 228, 633).

231. Lunz, *IPR*, II, 142, citing cases.

232. *Phoenix* case, cited *supra*, n. 228.

233. Engl. transl. of 1961 text in *Statutory PIL*, 303; German transl. of the text as amended in 1977 in Makarov ed., 3, 247.

234. Lunz *IPR*, II, 140; Boguslavski, II, 16.

235. Lunz, *IPR*, II, 347.

236. Act of 12 November 1964, s. 17, para. 1.

237. S. 24 of the Act on Private International Law of 1979, see German transl. in *Das Standesamt*, 3/80 78.

238. Art. 19 of the Act on Private International Law of 1982, see transl. in *NILR*, 1983, 222.

239. Szaszy, 281 (Bulgaria).

240. Trilingual text of the 1968 version in Zweigert and Köpholler (ed.), *Sources of International Uniform Law/Sources du Droit Uniforme International/Quellen des internationalen Einheitsrechts I* (Leiden, 1971), E 155, F 155, G 155. See now RGW-Dok, 208, and on the revised texts Gilson, "Les révisions de 1975 et 1979 des conditions générales de livraison de CAEM", *Clunet*, 1985, 415.

241. RGW, Dok., 278.

242. Lunz, *IPR*, II, 108-123, 109.

243. In case of a re-exportation of goods bought in a third non-Comecon country, Lunz and Kalensky have told me that they are of the opinion that the parties may agree upon the application of the law of the first seller, whereas Strohbach in a comment upon the present text has argued that there

is agreement among East German writers that such a sale is not covered by the General Conditions and that the conflict rules are absolutely mandatory.

244. Chilean CC of 14 December 1855, Art. 16; Mexican CC of 30 August 1928, Art. 13; see also Rabel (-Drobnig), *Conflict*, II, 372-374; Valladão, "Le droit international privé des états américains", *Recueil des cours* 81 (1952-II), 40.

245. Spain: Preliminary Title to the Civil Code (as revised 31 May 1974) (Codigo civil. Titulo preliminar: *RabelZ* 39 (1975), 724, with German translation), Art. 10, para. 5. Portugal: CC, Art. 41. For Latin American countries, see Goldschmidt and Rodriguez-Novas, 52, and cf. Garland, 55 and n. 199, 56; Etcheberry, 58; Eder, 57-58; Lombard, 62-63, and Rabel (-Drobnig), *Conflict*, II, 372. See also Arts. 2095 and 2096 of the Peruvian Civil Code, of 24 July 1984, Código civil, Edición oficial, Lima, 1984.

246. Prelim. Prov. CC, Art. 25 and Code of Navigation 1942, Arts. 9 and 10, see *Statutory PIL* 111; on labour contracts see Gamillscheg, *IECL*, Vol. III, Ch. 28, s. 16.

247. CC of 1940 (in force in 1946), Art. 25.

248. Art. 24 (1) of the Act on Private International Law of 20 May 1982, see *Rev.crit.d.i.p.*, 1983, 141, 144.

249. Patna, *The Indian Contract Act 1872* (New Delhi, 1966), I, 101-106; Rama Rao, "Conflict of Laws in India", *RabelZ* 23 (1958), 259-279, 277.

250. E.g., *Rivka Mazor v. Sabina Kirschenbaum* (S.Ct., 4 October 1956), *Clunet*, 1964, 162.

251. Law concerning the Application of Laws of 21 June 1898, Art. 7. For an English translation see Ehrenzweig, Ikehara and Jensen, 115.

252. Act on the Conflict of Laws of 10 March 1939 (Makarov I, sub Le Siam 5/Siam 6), para. 13.

253. Taiwan Act of 5 August 1918, Art. 23.

254. European Convention on International Commercial Arbitration of 21 April 1961, 484 UNTS 364; also in United Nations (ed.), *Register of Texts of Conventions and Other Instruments concerning International Trade Law II* (New York, 1973), 34, Art. VII, para. 1; see Klein, "La convention européenne sur l'arbitrage commercial international", *Rev.crit.d.i.p.*, 1962, 621 (631) and Lando, *Lex Mercatoria*, 755, see on the application of mandatory rules of the law of the habitual residence of the consumer, *infra*, 4.

255. PCII, 12 July 1929, *Clunet*, 1929, 977.

256. "*Saudi Arabia v. Arabian Oil Company (Aramco)*", *Rev.crit.d.i.p.*, 1963, 272; "*Sapphire International Petroleum Limited v. National Iranian Oil Company*", *Schw.Jb.Int.R.*, 20 (1963), 273, 284; "*Libyan Arab Republic v. California Asiatic Oil Company and Texaco Overseas Petroleum Co.*", *Riv.dir.int.*, 1978, 514, 518.

257. See, e.g., ICC, 1581/1971. *Clunet*, 1974, 887; 3281/81, *Clunet*, 1982, 990, following Art. 13 (3) of the Arbitration Rules of the International Chamber of Commerce of 1975.

258. See Statute of the International Court of Justice, Art. 38, lit. c.

259. Rabel (-Drobnig), *Conflict*, II, 365.

260. The same applies to several types of charterparties and bills of lading.

261. Some French cases indicate this; see Cass. civ., 19 February 1930 and 27 January 1931, s. 1933, 1: 41. See also Justice Holmes in *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493, 68 L.Ed. 402, 404 (1924): "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."

262. See, e.g., *Getreide-Import Gesellschaft m.b.H. v. Contimar S.A.* (1953), 1 W.L.R. 793 (C.A.).

263. See Reese, "Contracts and the Restatement of Conflicts of Laws, Second", 9 *ICLQ*, 531, 536 (1960).

264. See Danish HD, 30 January 1939, UfR 1939, A 296 and Rabel (-Drobnig), *Conflict*, II, 408.

265. *Supra*, (b) (ii) (2).

266. Part (Titre) V of Book (Livre) IV (Arts. 1492-1497).

267. Art. 1496.

268. See *supra*, (b) (i) (England), (b) (iv) (West Germany). These considerations also underlie the United Kingdom Sales of Goods Act 1979. According to s. 56 the mandatory provisions of the Act are not mandatory when the contract is an international sale.

269. Ross, 47, 54 and 120.

270. See the Hague Convention on the Law Applicable to International Sales of Goods of 1955, Art. 1. Soviet Union: Fundamentals of Civil Legislation, Art. 126 (foreign trade transactions). France: Cass.civ., 19 February 1930 and 27 January 1931, S. 1933.1.41; Trib. Seine, 7 June 1956, *Rev.crit.d.i.p.*, 1956, 683, and Cass. civ., 28 May 1963, *Rev.crit.d.i.p.*, 1964, 513. Germany: BAG, 20 July 1967, *IPRspr.*, 1966/67, No. 50b, p. 167: "mit Auslandsberührung". United States: Restatement 2d (1971), s. 187. European Community: Rome Convention, 1980, Art. 3 (3), compared with Art. 1. Netherlands: Hoge Raad, 13 May 1966, *N.J.*, 1967, No. 3. See also Moser, 199; Batiffol and Lagarde II, No. 575.

271. Lunz, *IPR*, II, 100-103; *idem*, *International Sale*, 6.

272. Cass.req., 31 July 1928, *Clunet*, 1929, 113, D.H., 1928, 461; see also Av.gen. Paul Matter in Cass.civ., 17 May 1927, D.P., 1928.1.25 at 31, in Cass., 9 July 1930, D.P., 1931.1.14 at 16 (IV), 17 (F); Cass.civ., 14 January 1931, D.P., 1931.1.18 at 21 (III) and Donnedieu de Vabres, 553, with reference to cases.

273. Cass.civ., 14 February 1934, *Clunet*, 1934, 373; Donnedieu de Vabres, 553.

274. In a decision of 30 January 1961, *IPRspr.*, 1960/61, No. 39b, the German Federal Supreme Court said obiter (p. 134) that the validity of a party reference to a foreign law and of a clause submitting to the jurisdiction of a foreign court would be doubtful if the reference were made by two Germans domiciled in Germany, if the contract lacked factors which connected it with foreign countries, and if by giving effect to these clauses the court would evade the mandatory rules of German law.

275. See Donnedieu de Vabres, 553; Lerebours-Pigeonnière (ed. 9), 647.

276. Restatement 2d (1971), s. 188. See also Steindorff, 26. His attempt to define an international fact situation as one which has substantial connections with several countries, is vague and must be so.

277. Cass.civ., 27 January 1931, S.1933.1.41.

278. *OJEC*, 7 August 1985, L 201/29 (85/374 EEC).

279. E.g., *Owens v. Hagenbeck-Wallace Shows Co.*, 192 A. 158 (R.I., 1937).

280. E.g., KG, 16 August 1956, *IPRspr.*, 1956/57, No. 178; RG, 28 May 1936, *RabelZ*, 10 (1936), 385.

281. (1939) A.C. 277 (P.C.).

282. See *supra*, 2 (b) (ii).

283. See *supra*, 2 (b) (iv); Kegel, *IPR*, 290, and Reithmann-Martiny, No. 10. Art. 27 of the Act on Private International Law of 25 July 1986 has made these decisions and *dicta* obsolete.

284. BG, 23 March 1965, BGE, 91 II 44.

285. Cass., 2 December 1960, *Riv.dir.int.*, 1961, 677.

286. E.g., *Lauritzen v. Larsen*, 345 U.S. 571 (1953) at 589.

287. Lunz, *IPR*, II, 140 and 144.

288. Ramsaizew, 19.

289. Lunz, *IPR*, II, 140.

290. *Doc. La Haye* (1951), 22; see also European Convention on International Commercial Arbitration of 21 April 1961, Art. VII, para. 1.

291. See also Batiffol and Lagarde, II, No. 575.
292. See on its genesis Rep. RC 282/18 (No. 8).
293. See Rep. RC 282/17 (No. 4).
294. Batiffol and Lagarde, I, No. 370, II, No. 575, Vander Elst, No. 84, on Italy see Ballarino, 352.
295. See Gaudemet Tallon, No. 70.
296. Rep. RC 284/38.
297. Wolff, *PIL*, 419.
298. Jessel, M.R., in *Printing & Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq. 462.
299. See Lando, *Unfair Contract Clauses and a European Uniform Commercial Code, New Perspectives for a Common Law of Europe*, Leiden, 1978, 267, 278.
300. E.g., United States: UCC, s. 2-302; Nordic countries: Contract Act, s. 36; West Germany: Standard Contract Law 1976, s. 9.
301. E.g., West German Standard Contract Law, ss. 10 and 11; French Decree of 24 March 1978 (*J.O.*, 1 April 1978); British Unfair Contract Terms Act 1977 (c. 7), only exemption and limitation of liability clauses; Austrian Consumer Protection Act of 1979.
302. E.g., West German Standard Contract Law 1976. Swedish Act on Contract Clauses in Consumer Relationships 1971 and Act on Contract Clauses in Business Relationships 1984.
303. E.g., French Decree of 24 March 1978, Austrian Consumer Protection Act, Swedish Act of 1971 (cited *supra*).
304. E.g., British Unfair Contract Terms Act, ss. 3, 4, 5, 6 (2) and (3), 7 (2), Swedish Contract Act, s. 36.
305. See Ghestin, *Traité de droit civil II, les Obligations, le Contrat*, No. 595.
306. West Germany: New Introd. Law, Art. 6. England: Dicey and Morris (-Morris) (ed. 10), 83, Rule 2: "... inconsistent with the fundamental public policy of English law"; he lists a series of English decisions on contracts where the doctrine of public policy was applied. France: Batiffol and Lagarde, I, No. 354. United States: Restatement 2d (1971), s. 90. Since 1956 the Hague Conventions on Private International Law have provided that the application of a law determined by the Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*). The Rome Convention has adhered to the same formula, see Art. 16.
307. West Germany: New Introd. Law, Art. 34. France: CC, Art. 3, para. 1; see Batiffol and Lagarde, II, Nos. 576 and 612. Francescakis, *La théorie du renvoi* (Paris, 1958), 11-14, talks of règles d'application immédiate (directly applicable rules), see also Art. 7 (2) of the Rome Convention 1980.
308. United States: Restatement 2d (1971), s. 6 (1) and (2) (*b*), with comments *b* and *e* giving the "relevant policies of the forum" a wider scope of application. See also s. 187 (2) (*b*), with comment *g*; and see Nussbaum, *PIL*, 71 (spatially conditioned internal rules).
309. See England: Dicey and Morris (-Morris) (ed. 10), 83; West Germany: Neuhaus, 363; United States: Leflar, 107; Switzerland: Vischer, *IPR*, 533.
310. Dicey and Morris (-Collins) (ed. 10), 794, Rule 149, exception, 1. The leading cases refer to public law rules, see *Regazzoni v. Sethia* (1958) A.C. 301, *Ralli Bros. v. Sota y Aznar* (1920) 1 KB 614, *Rossanao v. Manufacturers Life Insurance Co.* (1963) 2 QB 352.
311. For a discussion of the theories of these authors, see *infra*, 3 (*b*) (iii) (2).
312. See Francescakis, *La théorie du renvoi* (Paris, 1958), 11, Batiffol and Lagarde I, 251, II, No. 576.
313. Hoge Raad, 13 May 1966, see *supra*, (*b*) (iii) (2). For this theory see Struycken commenting on this decision in *Rev.crit.dip.*, 1967, p. 522.
314. E.g., *Lillienthal v. Kaufmann*, 395 P.2d 543 (Ore. 1964).

315. United States: *Owens v. Hagenbeck-Wallace Shows Co.*, 192 A 158 (R.I., 1937). Denmark: *Sø- og Handelsretten* Copenhagen, 22 May 1920, UfR, 1920, A 754. See also for England, *South African Breweries v. King* (1899) 2 Ch. 173, affirmed (1900) 1 Ch. 273 (C.A.).

316. E.g., *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465 (S.D.N.Y.), 1957.

317. See Message, 1982, 146-149, 229.

318. This correspondence is brought out very clearly by Fikentscher, *Arbeitsstatut, Prorogation und die Zugehörigen Grenzen der Parteiautonomie*: RdA, 1969, 204. It is also acknowledged in Socialist law. Employment in Soviet Russian law is not a contract forming part of private law. The work of an employee is not "a commodity which is bargained for", see Lunz, *IPR* II, 347. To be employed is to enter into the collective of the workers of the socialist enterprise. Some authors in Socialist countries therefore maintain that labour contracts should be excluded from party autonomy in the conflict of laws, see Lunz, *ibidem*, and Madl, 108.

319. See Griese, 56.

320. See on insurance contracts American Restatement 2d (1971), s.192, comments *c* and *e*. The present writer shares the view of Batiffol and Lagarde that the policy of the modern State to face social inequality has to be reflected in the conflict-of-law rules on contracts. Batiffol and Lagarde, however, find the distinction between "free" contracts and contracts "tainted with dirigisme" to be "délicate". They prefer to let the "lois de police" and other "directly applicable" rules operate independently of the proper law of the contract (Batiffol and Lagarde, II, No. 576, with n. 18). It is submitted, however, that the distinction between rules of that kind and other mandatory rules which are not to be directly applicable is not easily made either. Among others, the decisions of the Dutch courts in the *Alnati* case illustrate this contention. The *dépeçage* of the contract which the Batiffol – and – Lagarde approach will provoke, may create greater unpredictability than a distinction between free and controlled contracts and between commercial contracts on the one hand and consumer contracts and non-commercial contracts on the other hand.

321. The contract of agency which formerly was a "free" contract in West Germany was in 1953 made to resemble an employment contract and is now less "free", see German Comm., C., ss. 84-92 (Law of 6 August 1953, BGBl., I, 771). Formerly, employment contracts were infrequent in international trade in Western Europe, but since the war there has been much migration. The freedom of the parties to choose the applicable law should in such doubtful cases be left to the decision of the court and it is difficult to lay down a rule for all the specialized forms of contract. On the one hand, it is believed that in contracts of agency party autonomy should be upheld. This has also been recognized in a decision of the German Bundesgerichtshof of 30 January 1961, MDR, 1961, 496, *IPRspr.*, 1960/61, No. 39b. On the other hand, party autonomy should not be allowed an extensive sphere of operation where contracts of employment with subordinate staff are concerned. Agents need the freedom, for otherwise the import and the export trade may go through other channels. To give a corresponding freedom to employees would, however, cause disquiet and confusion on the national labour markets. The EEC Regulation on Social Security, No. 1408/71 of 14 June 1971 (*JOCE*, L, 149, p. 2), Arts. 13-14, providing conflict rules respecting social security for migrant workers within the Communities does not grant the workers and their employers any freedom to agree on the law applicable to social security; see also Rome Convention on the Law Applicable to Contractual Obligations, Art. 6.

322. The protective rules of the law of the consumer apply – if in that country the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or – if the other party or his agent received the consumer's order in that country, or

— if the contract is for sale of goods and the consumer travelled from that country to another country and there gave the order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy. A similar approach was adopted in the Texts on the Law Applicable to Certain Consumer Sales which were adopted at the 14th Session of the Hague Conference on Private International Law in 1980. These texts, however, which were to be considered by a later session were abandoned by the Extraordinary Session in 1985 where the new Convention on the Law Applicable to International Sales of Goods was adopted. This convention does not include consumer sales. Article 6 of the 1980 Texts had a provision which in many respects resembles Article 5 of the Rome Convention, see Decision and Declaration adopted by the 14th Session in 1980, and Minutes of the Extraordinary Session 1985, Commission I, No. 2 and No. 3 (15 and 16 October 1985).

323. See Dicey and Morris (-Morris) (ed. 10), 758 f. and on the concept of incorporation, *supra*, (a).

324. See Mayer, No. 686.

325. Denmark: Sø- og Handelsretten Copenhagen, 22 May 1920, UfR, 1920, A, 754.

326. This view is accepted by the authors of the Restatement 2d (1971), see s. 187, comment e. It does not seem to be supported by the cases, see Reporter's Note to s. 187, 572-573.

327. Denmark: Sø- og Handelsretten Copenhagen, 12 February 1957, UfR, 1957, A, 807.

328. *Whitman Co. v. Universal Oil Products Co.*, 125 F.Supp. 137 (D.C. Del. 1954); *Pisacane v. Italia Società Per Azioni di Navigazione*, 219 F.Supp. 424 (S.D.N.Y. 1963), and *General Electric Credit Corp. v. Beuerlein*, 286 N.Y.S. 2d 351 (S.Ct. 1967).

329. OLG, Braunschweig, 7 February 1908, *NiemeyersZ*, 18 (1908), 544.

330. *Royal Exchange Assurance Corp. v. Sjöforsakrings Aktiebolaget Vega*, (1901) 2 K.B. 567, affirmed (1902) 2 K.B. 384 (C.A.).

331. On the terminology, see *supra*, (a).

332. E.g., Haudek, 37; Nial, *Förmögenhetsrätt*, 22.

333. *Doc. La Haye* 7 (1951), 23-24.

334. See Rep. RC, 282/17. A similar requirement for an intention "clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety" is to be found in Art. 7 (1) of the Hague Sales Convention 1985 and, although slightly differently phrased, in the Hague Agency Convention 1978, Art. 5 (2).

335. Cass., 27 December 1948, No. 1937, *Giur. Compl. Cass. Civ.* 27 (1948), III, No. 161, see Ballarino, 869, and Vitta, 260.

336. Trib. Genoa, 13 May 1964, *Dir.maritt.* 1965, 473.

337. Jurisdiction clause: *N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co., Ltd.*, (1927) A.C. 604 (H.L.). Arbitration clause: *Hamlyn & Co. v. Talisker Distillery*, (1894) A.C. 202 (H.L.); *Spurrier v. La Cloche*, (1902) A.C. 446 (P.C.); *Tzortzis v. Monark Line A/B*, (1968) 1 W.L.R. 406 (C.A.). *The Parouth* (1982) 2 Lloyd's Rep. 351 (C.A.); *The Mariannina* (1983) 1 Lloyd's Rep. 12 (C.A.). See also Dicey and Morris (-Collins) (ed. 10), 761.

338. *Hamlyn v. Talisker* and *Spurrier v. La Cloche*, *supra*, n. 337. The selection of an English arbitration tribunal is often at the same time a selection of an English court because a party may bring legal questions before the court (special case).

339. *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.*, (1971) A.C. 572-609 (H.L.) at 596 per Lord Wilberforce.

340. Jurisdiction clause: Cass. civ., 28 June 1937, *Rev.crit.d.i.p.*, 1938, 62; Cour Rouen, 12 February 1953, *D.M.F.*, 5 (1953) 677; Cass. civ., 1 July 1964, *Rev.crit.d.i.p.*, 1966, 47. For older decisions see Batiffol, *Contrats*

No. 152. Arbitration clause: Cass.civ., 19 February 1930 (also a jurisdiction clause), and Cass. civ., 27 January 1931 (also choice of law). S. 1933.1.41. In a later case the Cour Paris (26 October 1962, *Rev.crit.d.i.p.*, 1965, 535) said "that the clause by which the contracting parties have agreed to submit disputes arising out of their contract to the decision by arbitrators of a certain country is one of the most significant indications that the contract, as they have conceived it, is localized in the country thus designated".

341. Cass. civ., 19 February 1930, S. 1933.1.41.

342. OLG, Frankfurt, 16 September 1982, *IPRspr.*, 1983, No. 17; BGH, 16 June 1969, *IPRspr.*, 1969, No. 3; BGH, 5 December 1966, AWD 1967, 108, *IPRspr.*, 1966/67, No. 41 (b); BGH, 1 July 1964, *IPRspr.*, 1964/65, No. 38; KG, 6 December 1955, *IPRspr.*, 1954/55, No. 186; OGHbz, 4 May 1950, *IPRspr.*, 1950/51, No. 18; see also Kegel, *IPR*, 292. Art. 27 (1) of the New Introd. Law will probably not change German law on this point.

343. Jurisdiction clause: BG, 15 May 1962, BGE, 88 II, 192, see Vischer, "Die Bundesgerichtspraxis zum internationalen Obligationenrecht 1958-1964", *Schw. Jb.Int.R.*, 21 (1964), 263; BG, 12 November 1956, BGE, 82, II, 553 and BG, 18 September 1934, BGE, 60, II, 294.

344. Denmark: Landsover-samt Hof og Stadsretten, 9 October 1899, UfR, 1899, A, 995; HD, 11 October 1928, UfR, 1928, A, 1045. See now Danish Act of 9 May 1984, which enacts the Rome Convention and its Article 3 (1) and which will probably not change Danish law on this point. Norway: Byrett Oslo, 22 September 1949, NDS 1949, 409; HD, 17 October 1896, NRT., 1897, 289; HD, 26 May 1934, NRT., 1934, 549. Sweden: HD, 19 May 1899, NJA, 1899, 184.

345. *Application of Doughboy Industries, Inc.*, 17 A.D. 2d 216, 233 N.Y.S. 2d 488, 494, n. 2 (1962). *Arison Shipping Co. v. Kloster's Rederi A/S*, 268 So. 2d 428 (Fla.App. 1972), does not seem to be conclusive.

346. Restatement 2d (1971), 218, comment b. The Tentative Draft No. 6 (1960) of the Restatement 2d, Ch. 8, viewed an arbitration clause as persuasive evidence of an intent to apply the law of the arbitral forum.

347. See Scoles and Hay, 633.

348. Genkin (ed.), 333-341.

349. Pfaff (-Waehler), 459.

350. From a decision of the Maritime Arbitration Commission of the USSR an appeal lies to the Supreme Court of the Soviet Union.

351. Becker, 52; Lunz, *IPR*, II, 138.

352. Kalensky, *Obligacni statut Kupni smluvy v mezina rodin obchodnim styku* (Prague, 1960), 282.

353. Szazy, 278, and *idem*, "Arbitration of Foreign Trade Transactions in the Popular Democracies", 13 *Am.J.Comp.L.*, 441, 447 (1964).

354. Lunz, *IPR*, II, 138-139.

355. Lunz, *IPR*, II, 138; Becker, 56. Szazy, 278, mentions that a different attitude is taken by the Czechoslovak Arbitration Commission.

356. See Capatina, 42.

357. Szazy, 277, refers to a Statute for the Arbitration Commission of 3 July 1957, Art. 27.

358. See Szazy, *ibidem*.

359. Fellhauer, "Das Schiedsgericht zog Bilanz", *RiA*, 1962, No. 7, 1, 6. His position seems to be supported by the award of the East German Arbitration Commission of 30 May 1964, *IPRspr.*, 1964/65, No. 36; see also Strohbach, "Deutsche Demokratische Republik. Rechtsprechungsbericht", *Pfaff*, 687, zu F-I-1.

360. Awards of 1 July 1959 (SG, Berlin, 48/58), 8 November 1968 (SG, Berlin, 252/67), and 24 April 1969 (SG, Berlin, 213/67). These decisions were kindly made available to me by Professor Dr. Strohbach, Berlin. There is probably no change since the East German Law on Private International

Law of 1975 came into force, see *Aus der Spruchpraxis des Schiedsgerichts bei der Kammer für Aussenhandel der DDR* (1967-1977). However, s. 12, para. 1, of the law gives no clear indication, providing: "If between parties to an international contract an agreement as to the applicable law was not made then the law of the seat of the ... applies." The Yugoslav Act of 1982 (Art. 19) and the Hungarian Ordinance of 1979 on Private International Law (Art. 24) are silent on the issue. Sarcevic (129) mentions that Yugoslav cases have recognized a clear tacit choice of law, and Soltan (*Revue internationale de droit comparé*, 1980, 87, 93) claims that the Hungarian Ordinance excludes the presumed intention.

361. *Doc. La Haye*, 8 (1956), 234, 237.

362. Vischer, *Vertragsrecht*, 71; see also *Doc. La Haye, supra*, n. 361.

363. The West German Government was aware of this and formulated a rule to this effect, see *Doc. La Haye*, 8 (1956), 238.

364. A party may, for instance, be able to show that the submission agreement was made for the purpose of securing a neutral court or of referring to the conflict rules of the chosen court.

365. See OLG, Stuttgart, 23 May 1960, *IPRspr.*, 1960/61, No. 25; Vischer, *Vertragsrecht*, 72, Fouchard, *L'arbitrage commercial international* (Bibliothèque de droit international privé, II) (Paris, 1965), No. 567; Lew, 205, and Lando, *Festschrift Zweigert*, 157, 164.

366. Rabel (-Drobnig), *Conflict*, II, 387, suggests that dealing at a stock or commodity exchange *per se* constitutes an implied choice of the law of the exchange.

367. Dicey and Morris (-Collins) (ed. 10), 761, and *Sayers v. International Drilling Co. N.V.*, (1971) 3 All E.R. 163, 1 W.L.R. 1141, 1196 (C.A.). The exclusion in the contract of the United Kingdom Workmen's Compensation Insurance in an employment agreement between a Dutch employer and an English employee held to indicate choice of Dutch law.

368. MünchKomm (-Martiny), No. 32, preceding Introd. C.C., Art. 12, Martiny maintained that the importance in German law of this provision was declining with the declining importance of the place of performance as connecting factor.

369. Austrian Supreme Court, 4 March 1980, *Clunet*, 1983, 633.

370. No indication: App. Firenze, 31 July 1958, reported in *RabelZ*, 31 (1967), 478 (by Jayme).

371. Language and currency may be, see BGH, 10 February 1969, *IPRspr.*, 1968/69, No. 29.

372. Dicey and Morris (-Collins) (ed. 10), 763. See on the one hand *The Industrie*, (1894) P. 58 (C.A.), and, on the other hand *The Njegos*, (1936) P. 90.

373. No indication: App. Rome, 5 June 1961, *Riv.dir.int.*, 1961, 681.

374. Contra: BG, 1936, BGE, 62, II, 140.

375. Dicey and Morris (-Collins) (ed. 10), 763.

376. *Idem*, 1206, Rule 210.

377. Scoles and Hay, 403. In the United States the laws of sister states do not always have to be proved by the parties, see on the Judicial Notice of Foreign Law Acts, *idem*, 407.

378. Dicey and Morris (-Collins) (ed. 10), 752-753, citing cases.

379. See *Whitworth Street Estates (Manchester), Ltd. v. James Miller & Partners, Ltd.*, (1970) A.C. 583 at 603 E, 606 E, 611 D, 614 M-615 A (H.L.).

380. See Samtleben, "Spanien, Portugal und Lateinamerika", *MPI*, Anwendung, 49 at 51, 57-59; Schwimann, "Österreich", *ibidem*, 81 at 83; Lando, "Skandinavien", *ibidem*, 128, 129; Zajtay, "Frankreich", *ibidem*, 16, and Cass.civ., 18 November 1959, *Rev.crit.d.i.p.*, 1960, 83.

381. See *supra*, (c) (iii) (5).

382. The Hungarian Act on Private International Law 1979 gives effect to the law chosen by the parties "at the conclusion of the contract or later", see

Art. 24. The Yugoslav Act of 1982 does not address the question but Sarcevic mentions that the Yugoslav arbitral tribunals uphold a subsequent choice, see Sarcevic, 129.

383. Lunz, "Sowjetunion", *MPI*, Anwendung, 141, 142, Szazy, 147.

384. Kalensky has told me that the Czechoslovak Arbitral Tribunal would uphold an agreement to apply the law of the forum.

385. BGH, 16 February 1967, WM, 1967, 419, *IPRspr.*, 1966/67, No. 16, and a number of decisions to the same effect, see MünchKomm (-Martiny), No. 18-19, preceding Introd. Law C.C., Art. 12, and now Art. 27 (2), of the New Introd. Law.

386. Raape, "Nachträgliche Vereinbarung des Schuldstatuts", *Festschrift Boehmer* (Bonn, 1954), 114-123; Nussbaum, *IPR*, 97, and 260.

387. BGH, 7 March 1962, *IPRspr.*, 1962/63, No. 18.

388. See Müller, "Deutschland", *MPI*, Anwendung, 66.

389. See, however, German CCProc., s. 139, but see discussion in *MPI*, Anwendung, 186.

390. See Lando, *MPI*, Anwendung, 129.

391. See on the Swiss draft law, Art. 113 (3), Message, 1982, 142.

392. BG, 25 August 1961, BGE, 87, II, 194, 200. On the different position taken by some cantonal courts, see BG, 28 May 1969, BGE, 95, II, 119.

393. Cass., 28 June 1966, No. 1680, Giust.civ., 1966, I, 1909, see also Ballarino, 865.

394. See Treves, "Sulla volontà delle parti di cui all'articolo 25 delle preleggi sul momento del suo sorgere", *Riv.dir.int.proc.*, 1967, 315.

395. Rep. R.C., 282/18.

396. See *supra*, (c) (iii).

397. Vischer, *Vertragsrecht*, 84.

398. Discussion in *MPI*, Anwendung, 186.

399. Lando, *MPI*, Anwendung, 129, and Flessner, "Fakultatives Kollisionsrecht", *RabelZ*, 34 (1970), 547, 582-583.

400. Dicey and Morris (-Collins) (ed. 10), 755, uses the words "visible connection". However, the exact meaning of the word visible does not appear from the text.

401. See for instance Cheshire (ed. 7), 200 and 203; and Morris, *Proper Law*, 197.

402. Prelim. Prov. CC, Art. 25, see *Statutory PIL*, 125. The CC of 1865, Art. 19, contained a similar rule.

403. CC, Art. 42, para. 2; *Statutory PIL*, 165.

404. Fundamentals of Civil Legislation, Art. 126.

405. Law governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953 (a Compilation of the Laws of the Republic of China, Taipei, 1967, I, 561), Art. 6, para. 2.

406. CC, Art. 968; see Rabel (-Drobnig), *Conflict*, II, 449.

407. Horei (Law on the Application of Laws) of 21 June 1898, Art. 7, para. 2.

408. Civil Code of the former Belgian Congo (Decree of 20 February 1891), Art. 11, para. 2.

409. Introd. Law CC of 4 September 1942, Art. 9.

410. CC, Art. 7.

411. See on the influence of the German draft, known as the Gebhardt Draft, Ehrenzweig, Ikehara and Jensen, 18.

412. Introd. Law CC, Art. 9, para. 2.

413. Law of 6 June 1953, Art. 6, para. 2, sent. 3.

414. Horei, Art. 9, para. 2.

415. Italian CC, Art. 1326; see Cass.sez.un., 4 May 1954, No. 1362, *Foro it.*, 1954, I, 784, and Morelli, *Elementi di diritto internazionale privato italiano* (Naples, 1968), 56. Vitta, 272, Ballarino, 856.

416. CC Proc. 1864, Art. 707; see Makarov, *Précis de droit international privé d'après la législation et la doctrine russes* (Paris, 1932), 293.

417. Makarov, "Das interregionale Privatrecht des vorrevolutionären Russlands", *ZvgIRW*, 54 (1941), 249 at 286, n. 2.

418. Several trade and navigation treaties between the Soviet Union and foreign countries have later prescribed the application of the law of the place of contracting in more absolute terms, see Ramsaizew, 45.

419. Becker, 53-54; see also Lunz, *IPR*, II, 135-150; Ramsaizew, 43-62.

420. Lunz, *IPR*, I, 167.

421. Becker, 54.

422. Becker, 55, who maintains that the method of enumeration was abandoned in 1953. However, the case *Nectone (Belgium) v. V/O Produtorg* decided on 4 May 1957, *Clunet*, 1960, 879, still left some doubts as to the method adopted.

423. Art. 126 was amended in 1977, see Makarov, 243, 247.

424. Makarov, "Kollisionsnormen in den 'Grundlagen für die Zivilgesetzgebung der Sowjetunion und der Unionsrepubliken'", *OER*, 1969, 12-14. It is doubtful whether this rule applies also to contracts made between parties neither of whom are Soviet Russian enterprises, see *Oscar Meyer (Switzerland) v. Coguis (Italy)*, 17 April 1964, *Clunet*, 1967, 702, where the law of Italy was applied to a contract made *inter absentes* because the last signature (of the defendant) was appended in Italy, see also Lunz, *International Sale*, 36, who seems to keep the question open.

425. Boguslavski, II, 18, and Waehler, 72, 73, with reference to literature and to the decision of 15 February 1967 in the case *Hewson, Chapman & Co. Ltd. v. Exportless, Rev. Arb.*, 1970, 174. In this case the Arbitration Commission in an obiter dictum, affirmed the right of the parties to agree on a place of contracting. Waehler criticizes this practice. It may mislead foreign enterprises which are unaware of the impact of such stipulation.

426. Case 91/1966, *Romulus Films, Ltd. v. Vsesojnuznoje Objedenenije Sovexportfilm* of 9 June 1967, *Clunet*, 1971, 378 and *Rev.crit.d.i.p.*, 1971, 471. See also case 92/1966, *Dorchester Holdings, Ltd., Nassau v. Vsesojnuznoje Objedenenije Sovexportfilm*. I am indebted to the Secretariat of the Soviet Foreign Trade Arbitration Commission for having made these decisions available to me.

427. Lunz, *IPR*, II, 349.

428. Several Mexican states and Chile, see Rabel (-Drobnig), *Conflict*, II, 372-375.

429. *Codigo civil, Edicion oficial*, Ministerio de Justicia, Lima, 1984.

430. Arts. 32 and 33, see Makarov, *Quellen*, No. 2.

431. Arts. 36 and 37, see Makarov, *Quellen*, No. 3.

432. Montevideo Treaty 1889, Art. 34, para. 4, Montevideo Treaty 1940, Art. 38, para. 4.

433. French translation in *Rev.crit.d.i.p.*, 1983, 141.

434. Makarov, "Die Resolution des 'Institut de droit international' über das internationale Obligationenrecht von 1903 und deren Einfluss auf die internationalen Kodifikationen des Kollisionsrechts", *Festschrift Lewald* (Basle, 1953), 299. See *infra*, (ii) (2).

435. Polish Act 1965, Art. 25, para. 2.

436. *Idem*, Art. 26.

437. *Idem*, Art. 27, para. 1, Nos. (1)-(4).

438. *Idem*, Art. 27, para. 3.

439. *Idem*, Art. 28.

440. *Idem*, Art. 27, paras. 2 and 29.

441. Maskow and Rudolph, *Regelung der Kollisionsprobleme internationaler Wirtschaftsbeziehungen in der DDR*, RIW/AWD, 1980-19.

442. German translation in *Das Ständesamt*, 1980, No. 3, 78.

443. Ss. 25-28.
444. S. 25.
445. S. 30.
446. See von Hoffmann and Ortiz-Arce, "Das neue spanische Internationale Privatrecht", *RabelZ*, 39 (1975), 647.
447. See *supra*, 2 (c) (iii) (6).
448. On the preference for the "strongest" instead of the "closest" connection, see Duchek-Schwind, 8.
449. Duchek-Schwind, 9, but see Schwimann, 123, who seems to advocate more flexibility.
450. Duchek-Schwind, 9, Schwimann, 124.
451. Duchek-Schwind, 18.
452. E.g., French Cass.civ., 17 February 1862, S. 1862.1.376; Cass. civ., 5 December 1910, S. 1911.1.29 and in England *Lloyd v. Guibert* (1865), 1 Q.B. 115 (Ex.Ch.); *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 272; *Jacob, Marcus & Co. v. The Credit Lyonnais* (1884), 12 Q.B.D. 589; *Benaim & Co. v. Debono*, (1924) A.C. 514 (P.C.).
453. Beale, II, 1102.
454. Pillet, *Principes*, 429; Niboyet, *L'autonomie*, 1; *idem*, *Traité*, V, 36.
455. von Bar, II, 4; Zitelmann, I and II, esp. II, 373.
456. Westlake, 278.
457. (1965) 1 Q.B. at pp. 120-121.
458. Justice Willes, *ibidem*, 122; *Chatenay v. Brazilian Submarine Telegraph Co.*, (1891) 1 Q.B. 79, 82.
459. *Chatenay v. Brazilian Submarine Telegraph Co.*, *ibidem*, 82-83.
460. Dicey, *The Conflict of Laws* (ed. 1, London, 1896), 569.
461. E.g., in *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321 (C.A.); *Jacob, Marcus & Co. v. The Credit Lyonnais* (1884), 12 Q.B. 589.
462. Batiffol, *Contrats*, 9-160, 35-45.
463. Cheshire (ed. 7), 188, *idem*, and North (ed. 10), 208, see also Gravson, 413-432; Morris, *Proper Law*, 197-207.
464. E.g., *Tomkinson v. First Pennsylvania Banking and Trust Co.*, (1961) A.C. 1007, 1068 (H.L.), appeal from *Re United Railways of the Havana and Regla Warehouses, Ltd.*, (1960) Ch. 62 (C.A.); *Philpston-Stow v. Inland Revenue Com'rs*, (1961) A.C. 727, 760 (H.L.).
465. See Lord Denning's judgment in *Whitworth Street Estates (Manchester), Ltd. v. James Miller & Partners, Ltd.*, (1969) 1 W.L.R. 377, 381 (C.A.). The decision was affirmed by the House of Lords (1970) A.C. 583.
466. See cases cited in the preceding two footnotes and *Rossano v. Manufacturers Life Ins. Co.*, (1963) 2 Q.B. 352 (C.A.) and *Bonython v. Commonwealth of Australia*, (1951) A.C. 201 (P.C.).
467. See *Whitworth Street Estates (Manchester), Ltd. v. James Miller & Partners, Ltd.* and *Rossano v. Manufacturers Life Ins. Co.*, cited *supra*, notes 465 and 466.
468. Dicey and Morris (-Morris) (ed. 10), Rules 153-160 and 162-169; *idem* (-Collins) (ed. 10), Rule 161.
469. Cheshire and North (ed. 10), 210, quoting Singleton, L.J. in *The Assunzione*, (1954) P. 150 at 176.
470. *Coast Lines, Ltd. v. Hudig and Veder Chartering N.V.* (1972) 2 Q.B. 34 at 47.
471. Dicey and Morris (-Morris) (ed. 10), 834, Rule 154. In the comments to the rule indications of some presumptions are cautiously given.
472. Cass.civ., 5 December 1910, S. 1910.1.129.
473. See Cass.civ., 31 May 1932, S. 1933.1.17.
474. But see Cour Paris, 21 July 1951, *Rev.crit.d.i.p.*, 1952, 706.
475. The law of the place of performance was for instance applied in Cour

Paris, 7 March 1938, *Rev.crit.d.i.p.*, 1939, 121; Cour Colmar, 11 March 1938, *ibidem*, 124.

476. See Trib. Seine, 5 July 1939, *Rev.crit.d.i.p.*, 1939, 450; Cass. civ., 11 July 1928, S. 1930.1.217; Cass. civ., 19 July 1937, *Rev.crit.d.i.p.*, 1938, 276.

477. Cass.civ., 28 June 1966, *Rev.crit.d.i.p.*, 1967, 334, 335; see also Cass.soc., 1 July 1964, *Rev.crit.d.i.p.*, 1966, 47.

478. Batiffol, *Contrats*, 35-45.

479. Cass.civ., 24 April 1952, *Rev.crit.d.i.p.*, 1952, 502; Cass. civ., 6 July 1959, *Clunet*, 1960, 476; 29 June 1971, *Clunet*, 1972, 51; 15 February 1972, *Rev.crit.d.i.p.*, 1973, 77; 25 March 1980, *Rev.crit.d.i.p.*, 1980, 576; 15 June 1982, *Clunet*, 1983, 602; 5 July 1984, *Rev.crit.d.i.p.*, 1985, 334. See also Cour Paris, 27 January 1955, *Rev.crit.d.i.p.*, 1955, 330; 26 October 1962, *Rev.crit.d.i.p.*, 1965, 535, and 23 April 1971, *Rev.crit.d.i.p.*, 1973, 58.

480. Batiffol, *Contrats*, 73, see the comment by Kahn to the decision of Cass., 29 June 1971, *Clunet*, 1972, 52.

481. See, e.g., Cour Paris, 6 May 1961, *Clunet*, 1962, 1004; 9 March 1961, *Rev.crit.d.i.p.*, 1964, 467; 19 February 1968, *Rev.crit.d.i.p.*, 1969, 257; Cass. civ., 25 March 1980, *Rev.crit.d.i.p.*, 1982, 742, *Clunet*, 1983, 602.

482. E.g., Cour Paris, 10 July 1965, *Rev.crit.d.i.p.*, 1966, 53; 9 March 1961, and 9 October 1962, *Rev.crit.d.i.p.*, 1964, 467, and 26 October 1962, *Rev.crit.d.i.p.*, 1965, 535.

483. Cour Paris, 6 May 1961, 19 February 1968 (*supra*, n. 481) and 26 March 1966, *Rev.crit.d.i.p.*, 1968, 58.

484. The Convention was applied in Trib.com., Paris, 27 November 1968, *Rev.crit.d.i.p.*, 1969, 700.

485. Egypt: CC (29 July 1948), Prelim. Ch. Art. 19, para. 1; Syria: CC (16 May 1949), Prelim. Ch. Art. 20, para. 1, using the same formula; Morocco: in the former French territory: Dahir, 12 August 1913, Art. 13; in the former Spanish territory: Dahir, 1 June 1914, Art. 20; in the former territory of Tangiers: Dahir, 15 January 1925, Art. 15, all using the same formula. Thailand: Act of 10 March 1938, Art. 13.

486. Thailand: common nationality; Egypt and Syria: common domicile; Morocco and former territory of Tangiers: common domicile or nationality.

487. Rigaux, No. 1136, Vander Elst and Weser, 148.

488. Cass., 24 February 1938, *Rev.crit.d.i.p.*, 1938, 661.

489. Cour Gand, 3 March 1949, *J.T.*, 1951, 434, and Cour Bruxelles, 28 June 1957, *J.T.*, 1958, 253, Trib.com., Brussels, 28 November 1969, *Clunet*, 1971, 885.

490. See Rigaux, No. 1138, Vander Elst, 149, Trib. com., Brussels, 12 November 1979, *Jur. com. Belg.*, 1980, 299.

491. Cass., 27 November 1974, *J.T.*, 1975, 62.

492. Vander Elst and Weser, 148. Employment contracts are perhaps, *prima facie*, governed by the law of the place of work, see Cour Bruxelles, 9 February 1935, *Clunet*, 1936, 195, and Cons. Prud'hommes de Liège, 14 September 1964, *J.T.*, 1965, 179, but see Cass., 27 March 1968, *J.T.*, 1968, 360, and *Clunet*, 1971, 888, and Vander Elst and Weser, 199. On the statutory provisions of the law on unilateral termination of sole distributorships contracts of 27 July 1961, see Vander Elst and Weser, 36, Rigaux, No. 1176 ff.

493. HD, 9 April 1883, UfR, 1883, A, 789.

494. HD, 5 June 1912, NJA, 1912, 231.

495. Lando, *Kontraktstatuttet* (ed. 1), 1962, 271.

496. Almén (ed. 2), 50 Federspiel, *Den internationale Privatre i Danmark* (Copenhagen, 1909), 290; Gjelsvik, 211.

497. HD, 13 February 1899, UfR, 1899, A, 370; HD, 19 June 1925, UfR, 1925, A, 839.

498. HD, 3 February 1934, NRt., 1934, 152; HD, 12 June 1928, NRt., 1928, 646.

499. HD, 5 June 1912, NJA, 1912, 231.
500. See *supra*, 1 (b) and 2 (b) (iv) (1).
501. HD, 8 December 1937, NRT., 1937, 888.
502. HD, 30 January 1937, NJA, 1937, 1.
503. HD, 30 January 1939, UfR, 1939, A, 296, and also HD, 13 December 1934, UfR, 1935, A 82.
504. Norway: see, e.g., HD, 11 September 1965, NRT., 1965, 835; 7 June 1969, NRT., 1969, 664, and 28 August 1969, NRT., 1969, 821. Denmark: VLD, 20 February 1973, UfR, 1973, A 583; ØLD, 17 February 1966, UfR, 1967, A, 405; HD, 18 December 1964, UfR, 1965, A, 83; Søl- og Handelsretten Copenhagen, 25 November 1959, Søl- og Handelsretstidende 1960, 12.
505. Finland: Klami, 16, Norway: Gaarder, 108, Sweden: Nial, 45 f., Bogdan, 211.
506. See on its application by the Greek courts, *Clunet*, 1971, 331 ff. and 1976, 963 (Evrigenis and Drakidis).
507. Renmin Ribao, Beijing, 22 March 1985. I am indebted to Dr. Frank Münzel, Hamburg, for submitting the texts to me in a German translation.
508. Renmin Ribao, 17 April 1986.
509. Ann. Inst. Dr. Int. 22 (1908), 206 and 289-292.
510. See Makarov (*op. cit.*, n. 434), at 303.
511. Nussbaum, *IPR*, 226-234; Wolff, *IPR* (1933), 89-91, and *IPR* (1954) 143-145.
512. Batiffol, *Contrats*, 69-160 and 161-321.
513. Schnitzer, I, 52-54, and II, 639-648.
514. Rabel (-Drobnig), *Conflict*, II, 482-486.
515. Drobnig, 225, 232, 239, 240; Soergel and Siebert (-Kegel), No. 240-268, preceding Introd. Law CC, Art. 7.
516. See Drobnig, 225-251, 233; Müller-Gindullis, *Das Internationale Privatrecht in der Rechtsprechung des Bundesgerichtshofes (Materialien zum ausländischen und internationalen Privatrecht no. 14)* (Berlin, New York a.o., 1971), 44-61; MünchKomm (-Martiny), Nos. 33-80 and 145-297, preceding Introductory Law CC, Art. 12.
517. BGH, 1 February 1952, *IzRspr.*, 1945/53, No. 402 b (Vol. 2. 125).
518. Drobnig, 232-240.
519. Reithmann (-Martiny), No. 69 and cases cited there. OLG, Frankfurt, 21 December 1982, *IPRspr.*, 1982, No. 23.
520. BGH, 30 April 1959, *IPRspr.*, 1958/59, No. 75, affirming OLG, Düsseldorf, 28 November 1956, *IPRspr.*, 1956/57, No. 53.
521. OLG, Düsseldorf, 4 August 1961, *IPRspr.*, 1960/61, No. 152 and AWD, 1962, 295.
522. BGH, 15 March 1962, *IPRspr.*, 1962/63, No. 41.
523. E.g., BGH, 19 October 1960, *IPRspr.*, 1960/61, No. 28.
524. BGH, 28 October 1965, *IPRspr.*, 1964/65, No. 49 (8th senate), see also BGH, 9 January 1969, *IPRspr.*, 1968/69, No. 245 and DB, 1969, 615 (7th senate), but see BGH, 1 December 1967, *IPRspr.*, 1966/67, No. 4 (1st senate).
525. MünchKomm (-Martiny), No. 80, preceding Introd. Law CC, Art. 12.
526. According to Kreuzer, 175, the latest decision by the Supreme Court in which two legal systems were applied to the same contract was RG 27 May 1924, *WarnRspr.*, 1925, No. 32.
527. BGH, 14 February 1958, *IPRspr.*, 1958/59, No. 39. In a preceding case decided by the same senate of the BGH, 10 January 1958, *IPRspr.*, 1958/59, No. 37, the OLG had applied the doctrine of renvoi and this method was neither disavowed nor endorsed by the BGH, see Kreuzer, 285; see also OLG, Frankfurt, 13 November 1956, *IPRspr.*, 1956/57, No. 24.
528. BGH, 9 June 1960, *IPRspr.*, 1960/61, No. 23.
529. OLG, Frankfurt, 27 October 1966, *IPRspr.*, 1966/67, No. 33; LG Hamburg, 10 June 1974, *IPRspr.*, 1974, No. 154.

530. Moser, 8-43, Vischer, *Vertragsrecht*, 89-144, *idem*, *IPR*, 672-680, and Message, 1982, 143 ff.
531. BG, 12 February 1952, BGE, 78 II 74, 79 (*Chevalley v. Genimportex*).
532. *Idem*, at 77.
533. Schnitzer, II, 639.
534. In 1972 Switzerland ratified the 1955 Hague Convention on the Law Applicable to the International Sales of Goods.
535. BG, 8 November 1983, *Schw.Jb.Int.R.* 41 (1984), 327 (transport), and BG, 22 April 1974, BGE, 101, II, 293 (licence contract).
536. For references to cases see Vischer, *Vertragsrecht*, 114 and *idem*, *IPR*, 672.
537. See Message, 1982, 143 ff., Art. 114 ff.
538. *Idem*, 146 ff., Art. 117.
539. Reliance on the presumed intention of the parties has been criticized by Deelen, 281-282.
540. Czapski, "Niederländische Rechtsprechung zum internationalen Privat- und Prozessrecht (1959-1964)", *RabelsZ*, 30 (1966), 701, citing, *inter alia*, Hof s'Hertogenbosch, 19 November 1963, *N.J.*, 1964, No. 178, and *idem* (1965-1968): *RabelsZ*, 34 (1970), 86, citing Rb., Breda, 19 December 1967, *N.J.*, 1968, No. 390; Rb., Leeuwarden, 6 June 1964, *N.J.*, 1966, No. 12, and 30 November 1967, *N.J.*, 1968, No. 44, see also Sauveplanne, 57 ff., citing Hof Amsterdam, 1 April 1970, *N.J.*, 1970, No. 115.
541. Hoge Raad, 17 April 1964, *N.J.*, 1965, No. 22.
542. See Rb. Leeuwarden, 4 June 1964 and 30 November 1967, *supra*, Hof Arnhem, 15 February 1979, *N.J.*, 1979, No. 579, and Sauveplanne, 57, 59, but see Hof Amsterdam, 8 June 1977, *N.J.*, 1978, 191, *NILR*, 1980, 371.
543. Rb. Den Haag, 18 January 1966, *N.J.*, 1966, No. 470, see also Krg. Amsterdam, 25 March 1964, *N.J.*, 1964, No. 437, and Rb. Amsterdam, 26 June 1968, *N.J.*, 1968, No. 271, but see Ktg. Amsterdam, 25 January 1963, *N.J.*, 1965, No. 223.
544. See Sauveplanne, 57 f.
545. See *OJEC*, 11/266 of 9 October 1980 and Rep. RC, No. C 282/1-50.
546. See Rep. RC, C, 282/20.
547. On the law of the Socialist countries see Pfaff, "Probleme der Anerkennung und Vollstreckung jugoslawischer Schiedssprüche", *AWD*, 1970, 55; *idem*, "Die Aussenhandels-Schiedsgerichtsbarkeit in der Volksrepublik Albanien", *AWD*, 1970, 261.
548. See s. 10, para. 2. This latter rule comes closer to the law of the common law countries than to the laws of most civil law countries according to which the place of contracting for agreements made *inter absentes* is the place of the offeror.
549. German transl.: *WGO*, 7 (1965), 77-84.
550. See Lipowschek, "Das neue jugoslawische Internationale Privat- und Prozessrecht im Bereich des Vermögensrechts", 49 *RabelsZ* (1985), 426, 434, and Sarcevic, 125, 131.
551. On Romania, see Szazy, "The Proper Law of the Contract in Trade between Eastern Europe and the West. The Position of East European Socialist States", 18 *ICLQ*, 103, 128 (1969), and Nestor, "Chronique de jurisprudence roumaine", *Clunet*, 1968, 425, but see 427 (law of the place of performance applied). On the application of the law of the place of contracting in contracts made *inter absentes*, see *ibidem*, 429.
552. On Bulgaria, see Szazy (*supra*, n. 551) 103, 127 and Kojouharoff, "Chronique de jurisprudence de la Cour arbitrale près la chambre de commerce bulgare", *Clunet*, 1967, 152.
553. E.g., von Mehren and Trautmann, Leflar and Weintraub. See the survey of the theories in Weintraub, 6-11.

554. 91 U.S. 406 (1875).

555. Restatement (1934), s. 332: "Law Governing Validity of Contract. The law of the place of contracting determines the validity and effect of a promise with respect to: (a) capacity to make the contract; (b) the necessary form, if any, in which the promise must be made; (c) the mutual assent or consideration, if any, required to make a promise binding; (d) any other requirements for making a promise binding; (e) fraud, illegality, or any other circumstances which make a promise void or voidable; (f) except as stated in s. 358, the nature and extent of the duty for the performance of which a party becomes bound; (g) the time when and the place where the promise is by its terms to be performed; (h) the absolute or conditional character of the promise."

S. 358: "Law Governing Performance. The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to: (a) the manner of performance; (b) the time and locality of performance; (c) the person or persons by whom or to whom performance shall be made or rendered; (d) the sufficiency of performance; (e) excuse for non-performance."

556. The fact of this lip service has been noted by several American authors, see, e.g., Ehrenzweig, *Treatise*, 465.

557. 91 U.S. 406, 412-413 (1875).

558. 142 U.S. 116, 120 (1891); see also *Pritchard v. Norton*, 106 U.S. 124 (1882).

559. Beale, II, 1079.

560. Ehrenzweig, "The Statute of Frauds in the Conflict of Laws", 59 *Colum.L.Rev.* 874 (1959). In his *Treatise*, 465, Ehrenzweig found the rule of validation to be a basic rule followed by American courts in cases concerning the validity of a contract; it may, he said, not be expressed in the reasonings of the courts, but it is followed in their actual holdings; see also Weintraub, 284-289. To the present writer the validation of contracts is an important trend in American case law concerning validity, but it can hardly be termed the basic rule.

561. 365 U.S. 731, 741 (1961).

562. Beale, II, s. 332.2; Nussbaum, *PIL*, 182; Rabel (-Drobnig), *Conflict*, II, 410.

563. In the beginning through covert techniques (see *Andrews v. Pond*, 38 U.S. (13 Pet.) 65 (1839); *Miller v. Tiffany*, 68 U.S. (1 Wall) 298 (1863)) and later more openly, see *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 71 L.Ed. 1123 (1927).

564. *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 408 (1927).

565. E.g., *Fahs v. Martin*, 224 F.2d 387 (5 Cir. 1955); *National Surety Corp. v. Inland Properties Inc.*, 286 F. Supp. 173 (D.C.Ark. 1968); *Blackford v. Commercial Credit Corp.* 263 F.2d 97 (5 Cir. 1959).

566. Batiffol, *Contrats*, 198.

567. Ehrenzweig, *Treatise*, 481; Weintraub, "The Contracts Proposals of the Second Restatement of Conflict of Laws - A Critique", 46 *Iowa L.Rev.* 713 (1960/61); but see now *idem*, 378; Westen, "Usury in the Conflict of Laws. The Doctrine of the *Lex Debitoris*", 55 *Calif. L. Rev.*, 123 (1967).

568. See the list of cases cited by Westen, *supra*, and Scoles and Hay, 677.

569. See *London Finance Co. v. Shattuck*, 221 N.Y. 702, 117 N.E. 1075 (1917); *Kinney Loan & Finance Co. v. Summer*, 159 Neb. 57, 65 N.W. 2d 240 (1954). See also Weintraub, 376.

570. See cases mentioned by Batiffol, *Contrats*, 295 and 305 and by Rabel (-Bernstein), *Conflict*, III, 319-335.

571. Beale, II, s. 314.1, s. 319.1, and Restatement (1934), ss. 314-319; see now Restatement 2d (1971), ss. 192-193.

572. *Auten v. Auten*, 124 N.E. 2d 99 (N.Y. 1954); *Rubin v. Irving Trust*,

113 N.E.2d 424 (N.Y. 1953); *Hicks and Son v. I.T. Baker Chemical Co.*, 307 F.2d 950 (2 Cir. 1962).

573. See, e.g., *Jansson v. Swedish American Line*, 185 F.2d 212 (1 Cir. 1950), 218: "the centre of gravity of the contract or of that aspect of the contract immediately before the court".

574. Restatement 2d, Draft 1960, s. 332, 332b, s. 346e-346n and *W. H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (Ind. 1945). *Re Knipple's Estate*, 96 N.W.2d 514 (Wis. 1959), and *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7 Cir. 1960).

575. *Auten v. Auten* (*supra*, n. 572); see also *Swift & Co. v. Bankers Trust Co.*, 19 N.E.2d 992 (N.Y. 1939), and *Bernkrantz v. Fowler*, 55 Cal. 2d 588, 366 P.2d 906 (1961); *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y. 2d 372, 300 N.Y.S.2d 817, 248 N.E.2d 576 (1969).

576. Cook "Contracts" and the Conflict of Laws — 'Intention' of the Parties", 32 *Ill. L. Rev.*, 899, 918, 919 (1937/38); Harper, "Policy Bases of the Conflict of Laws", 56 *Yale L.J.*, 1155, 1164-1168 (1946/47).

577. Currie, *passim* in Cavers, *Critique. Auten v. Auten* (*supra*, n. 572) mentioned the English case *Boissevain v. Weil*, (1949) 1 K.B. 482, 490 (C.A.), where Lord Denning had pointed to the law of "the place where the contract has its most substantial connection".

578. Among the several American authors advocating the modern theories on the conflict of laws Cavers and Currie are treated here *exempli gratia*. A correct, although very comprehensive, presentation of the modern theories would have comprised several authors such as Leflar, von Mehren and Trautman, Weintraub, Reese (the Reporter of the Restatement 2d (1971)) and Ehrenzweig, see Weintraub, 6.

579. Cavers, *Critique*; see also *idem*, *Choice-of Law Process*.

580. *Idem*, *Choice-of Law Process*, 181: "... Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centred there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law."

581. *Idem*, 194: "If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centred there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interests created run counter to applicable mandatory rules of the situs of the land. This principle does not govern the legal effect of the transaction on third parties with independent interests."

582. *Idem*, 122.

583. Cheatham and Reese, "Choice of the Applicable Law", 52 *Colum. L. Rev.*, 959, 980 (1952); Weintraub, 6, 373.

584. Leflar, 195, 212.

585. Leflar in 48 *B.U.L.* 164, 168 (1968), here quoted from Reese and Rosenberg, 474.

586. See, *inter alia*, *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161 (1946), *Global Commerce Corp. v. Clark-Babbitt Industries*,

239 F.2d 716 (2 Cir. 1956), and *Hague v. Allstate Ins. Co.*, 289 N.W. 2d 43 (Minn., 1979).

587. Currie, *passim*; see also a brief statement of Currie's theory in Reese and Rosenberg, 469, and Heini, "Neuere Strömungen im amerikanischen internationalen Privatrecht", *Schw.Jb.Int.R.*, 19 (1962), 47.

588. Currie favoured a "moderate and restrained" interpretation of the law of the forum so as to avoid conflict with an interested foreign state, see Currie's opinion in Cavers, *Choice-of-Law Process*, 52 in which he approves of Justice Traynor's moderate construction of a California rule of law in *Bernkrantz v. Fowler* (*supra*, n. 575).

589. Currie was also in favour of applying the solution of the interested state, if it coincided with that of the *lex fori*. He sometimes modified his theory. In one of his later articles he was inclined also to allow the choice of the better rule in this situation, see *idem*, "The Disinterested Third State", 28 *Law & Contemp. Prob.*, 754 (1963).

590. See von Mehren and Trautman, 76, 408.

591. Restatement 2d (1971), 6: "Choice-of-Law Principles. (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."

592. And also in s. 198 on capacity, s. 199 on formalities and in s. 203 on usury.

593. Restatement 2d (1971), Introductory note to s. 198.

594. See the survey given in Scoles and Hay by Weitnauer, p. 666.

595. *Ury v. Jeweler's Acceptance Corp.*, 38 Cal.Rptr. 376 (D.C.App. 1964); *Cochran v. Ellsworth*, 126 Cal. App. 2d 429, 272 P. 2d 904 (1954).

596. *Intercontinental Planning, Ltd. v. Daystrom, Inc.* 24 N.Y. 2d, 372 (1969), 248 N.E. 2d 576.

597. Arizona: *Taylor v. Security National Bank*, 514 P.2d 257 (1973). Delaware: *Oliver B. Cannon and Son Inc. v. Dorr-Oliver Inc.*, 394 A.2d 1160 (1978). Colorado: *Wood Bros. Homes Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369 (Sp. Ct. 1979). Connecticut: *Jenkins v. Indemnity Inc. Co. of North America*, 204 A2d. 780 (1964). Georgia: *Brown v. Inter-Ocean Ins. Co.*, 438 F. Supp. 951 (N.D., Ga. 1977). Hawaii: *Commercial Insurance Co. of Newark v. Pacific-Peru Construction Co.*, 558 F.2d 948 (9th Cir. 1977). Idaho: *Uniguard Insurance Group v. Royal Globe Ins. Co.*, 594 P.2d 633 (1979). Illinois: *Illinois Tool Works v. Sieracim Corp.*, 479 N.E.2d 1046 (Ill. App. 1. Dist. 1985). Indiana: *W. H. Barber Co. v. Hughes*, 63 N.W. 2d 417 (1945). Kentucky: *Prudential Resources Corp. v. Plunketti*, 583 S.W. 2d 97 (1979). Louisiana: *Sutton v. Langley*, 330 So. 2d 309 (La. App. 2d Cir. 1976). Massachusetts: *Bushkin Associates Inc. v. Raytheon Co.*, 473 N.E.2d 662 (1985). Minnesota: *Hague v. Allstate Ins. Co.*, 289 N.W. 2d 43 (1979). Mississippi: *FMC Finance Corp. v. Reed*, 592 F.2d 238 (5th Cir. 1979). Missouri: *Bernstine v. Fidelity Union Life Ins. Co.*, 449 F.Supp 327 (E. D. Mo. 1978). New Hampshire: *Consolidated Mutual Ins. Co. v. Radio Foods Corp.*, 240 A 2d 47 (1968). New Jersey: *Oxford Consumer Discount Co. v. Steffanelli*, 246 A 2d. 460 (1968). Ohio: *Gries Sports Enterprise Inc. v. Modell*, 473 N.E. 2d 807 (1984). Oregon: *Lilienthal v. Kaufman*, 395 P.2d 543 (1964). Pennsylvania: *Kuchinic v. McCrory*, 222 A2d 897 (1966). Tennessee: *Agricultural Services Association Inc. v. Ferry-Morse Seed Co. Inc.*, 551 F.2d 1057 (6th Cir. 1977). Texas: *Duncan v. Cesna Aircraft Co.*, 665 S.W. 2d 414 (Sp. Ct. 1988). Washington:

Baffin Land Corp. v. Monticello Motor Inn Inc. 425 P.2d 633 (1967). Vermont: *Boston Law Book Co. v. Hathorn*, 127 A.2d 120 (1956). Wisconsin: *Urhammer v. Olson*, 159 N.W. 2d 688 (1968). The number of states which are likely to follow the new approaches is greater. States which, for instance, have adopted the new approaches in tort cases and not (yet) in contract cases are likely to do so when an issue in contract arises.

598. *Maloney v. E.I. Dupont de Nemours & Co.*, 352 F.2d 936 (D.C. Cir. 1965).

599. *Lummes Co. v. Commonwealth Oil Refining Co.*, 289 F.2d 915 (1 Cir. 1960).

600. *Oxford Consumer Discount Co. v. Stefanelli* (*supra*, n. 597); *Potlach No. 1 Federal Credit Union v. Kennedy*, 459 P.2d 32 (Wash. 1969). *Wood Bros. Homes Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369 (Sp. Ct. Colo. 1979); *Johnson v. Spider Staging Corp.* 555 P.2d 997 (Sp. Ct. Wash. 1976). Weitnauer (1980) lists District of Columbia, Puerto Rico and 12 states as "Restatement 2d States" and 21 states as "Restatement 1st States", see p. 143. Since then at least 5 of the "Restatement 1st States" (Delaware, Illinois, Massachusetts, Ohio and Texas) and 3 states which he then would not list as belonging to any of the two categories (Colorado, Idaho and Louisiana) have converted to the Restatement 2d.

601. E.g., *Global Commerce Corp. v. Clark-Babbitt Industries* (*supra*, n. 586), *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W. 2d 328 (1970).

602. *Kuchinic v. McCrory*, *supra*, n. 597, Oxford Consumer Discount case, *supra*, n. 597.

603. E.g., *Mutual Life Ins. Co. v. Simon*, 151 F.Supp. 408 (S.D.N.Y., 1957).

604. See Scoles and Hay, 666.

605. This a New York Court did in *Haag v. Barnes*, 175 N.E.2d 441 (1961).

606. See *Lilienthal v. Kaufman* (Oregon), *supra*, n. 597.

607. For a criticism of this approach see Scoles and Hay, 666 ff.

608. E.g., *Home Insurance Company v. Dick*, 281 U.S. 397 (1930).

609. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941) and notably *Allstate Ins. Co. v. Hague*, 444 U.S. 1070 (1980). For a criticism of this backing away from control of state choice of law, see Scoles and Hay, 85 ff.

610. See Leflar, 181, and *Silver v. Nelson*, 610 F. Supp. 505 (D.C. La, 1985).

611. Currie among others in: "Comments on *Babcock v. Jackson*, a Recent Development in Conflict of Laws", 63 *Colum. L. Rev.*, 1212 (1233, 1242) (1963).

612. Ehrenzweig, *Treatise*, 309.

613. On the extent to which the parties by an agreement as to the law applicable may disregard the appropriate relation test where a "reasonable relation" to the law chosen by them is found to exist, see *supra*, 2 (b) (v) (6). UCC, s. 1-105 (2) refers to a number of important exceptions from the rule provided for in UCC, s. 1-105 (1).

614. UCC, s. 1-105, Official Comment (1962), No. 3.

615. UCC, s. 1-105, Official Comment (1962), No. 2.

616. See Scoles and Hay, 672.

617. See Rabel (-Drobnig), *Conflict*, I, 94.

618. See, e.g., Kahn, F., *Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts*; *idem*, *Abhandlungen zum internationalen Privatrecht I* (Leipzig, 1928), 1-123, 112, and Currie.

619. The suggestion by Currie to apply the *lex fori* to some of these cases probably also applies to contracts, see Currie, "Survival of Actions", 10 *Stan. L. Rev.*, 205, 245 (1958).

620. For a moderate and restrained particularism see von Mehren and Trautman, 299-304.

621. Lando, "Renegotiation and Revision of International Contracts", *German Yearbook of International Law*, 23 (1980), 37, 40.

622. Manifestations of these attempts are the Czechoslovak International Trade Code of 4 December 1963, Sb. 1963, No. 57, pos. 101, the Act Regulating the Contracts of International Trade 1976 of the German Democratic Republic (Gesetzblatt der DDR, 10 February 1976, Teil I, No. 5, pp. 61 ff.), and the Foreign Trade Contracts Act 1985 of the Peoples Republic of China (Renmin Ribao, Beijing, 22 March 1985), which on the basis of comparative research have enacted special substantive provisions for the international trade.

623. See West German Council of Private International Law, "Report on the Law Applicable to International Sales of Goods", *Doc. La Haye*, 8 (1956), II, 234.

624. See *supra*, (b) (iii), on the American cases. It is not unlikely that the courts will then develop covert techniques in order to reach equitable results. One is, for instance, to make a generous application of the rule on tacit choice of law by the parties, see Austrian Supreme Court, 4 March 1980, *Clunet*, 1983, 633.

625. For another example concerning the Statute of Frauds see *Bushkin Associates Inc. v. Raytheon Co.*, 473 N.E.2d 662 (Mass. 1985).

626. See Cavers, *Choice-of-Law Process*, 100.

627. See Restatement 2d (1971), 6 (2) (a).

628. See on this question *supra*, 1 (a).

629. See Currie, 105.

630. On the use of the term by American courts, see *supra*, (b) (iii) (2).

631. E.g., the presumption in favour of applying the law of the place of contracting to contracts which are negotiated at the place of business of one of the parties.

632. Morris, *Conflict*, 226.

633. Cheshire and North (ed. 10), 210.

634. See *supra*, (b) (ii) (1).

635. See, *inter alia*, Danish HD, 11 January 1946, UfR, 1946, A, 262. The Principle was stated by the Danish Labour Court in a decision of 6 October 1920, see Den faste Voldgiftsrets Kendelser 1920 (Copenhagen, 1921), K 32. The foreign defendant was considered to have broken a tariff agreement with the plaintiff, a Danish trade union, by having employed non-organized foreign workers at a lower tariff. Although the agreement did not contain an express provision to this effect it was to be construed so as to cover all workers employed by the enterprise: "organized and non-organized, foreign and domestic workers"; see also *Sayers v. International Drilling Co. N.V.*, (1971) 1 W.L.R. 1141 (C.A.), where Stamp, L.J., said (p. 1186) that one single law must govern all work performed at a certain place. If not "there could be nothing but confusion".

636. It was probably considerations of this nature which persuaded the authors of the Austrian Act of 1978 to provide in Art. 1 for a general principle of the law of the "strongest" and not the "closest" connection, see Duchek-Schwind, 8, Schwimann, 55.

637. David in *I.E.C.L.*, Vol. II, Ch. 5 (1969), 16, Ehrenzweig, 463, and 548. Juenger in 46 *RabelsZ* (1982), 72 f.

638. Wolff, *IPR* (1954), 143.

639. Dicey and Morris (-Mann) (ed. 10), 89.

640. See Mayer, *Les lois de police*, 310 and note 94.

641. See Gamillscheg, *Arbeitsrecht*, 100, 198, 345; and Däubler, "Grundprobleme des internationalen Arbeitsrechts", *AWD*, 1972, 1. Developments in Italian case law point, however, in the opposite direction: the courts submit the entire relationship arising out of the employment to the proper law,

even if the work is carried out in Italy. See Trib. Milano, 3 October 1966, *Riv.dir.int.proc.*, 1967, 157; 11 May 1967, *Riv.dir.int.proc.*, 1968, 132; 26 September 1968, *Riv.dir.int.proc.*, 1968, 916. See also Vitta, III, 320, 337.

642. Support for this view is found in Rb. Amsterdam, 7 May 1957, *Clunet*, 1961, 892.

643. See Cook, 154, and *The Harrisburg*, 119 U.S. 199, 30 L.Ed. 358 (1886), Restatement 2d (1971), ss. 142 and 143; for England see *Huber v. Steiner* (1835), 2 Bing. (N.C.), 203, 132 E.R. 80 (C.P.); but see *Black Clawson International v. Papierwerke Waldhof-Aschaffenburg*, (1975) A.C. 591 (H.L.), and on the Foreign Limitation Periods Act 1984 (C.16) (in 1985 not yet in force), Dicey and Morris (-McClellan), 1180 f., 4th Cumulative Supplement, 1985 (101).

644. See *infra*, (ii) (1) and (iv) (2).

645. See the Rome Convention, 1980, Art. 4 (3).

646. See Rabel (-Bernstein), *Conflict*, III, 105, 106-107; Batiffol, *Contrats*, 108.

647. See, however, the Rome Convention, 1980, Art. 4 (4).

648. Kent, 453-463; Story (ed. 3), 295-296.

649. Beale, I, 308, and II, 1091.

650. See Nussbaum, *PIL*, 40, n. 29.

651. See, for instance, Niboyet, *Cours*, 603; *idem*, *Traité*, V, 132.

652. See *supra*, (b) (i) (1).

653. Beale, II, 1091.

654. Story (ed. 3), s. 242.

655. See Ballarino, 856, who states that in Italy the rule has hampered the evolution of private international law.

656. See Hague Sales Convention, 1985, Art. 8 (2) (a).

657. See now Cour Paris, 26 March 1966, *Rev.crit.d.i.p.*, 1968, 58; Swiss BG, 25 August 1961, BGE, 87, II, 194.

658. See Hague Sales Convention 1955, Art. 3 (3), and Hague Sales Convention 1985, Art. 9.

659. The importance is decreasing. Thus the Restatement 2d (1971), 188, makes a distinction between the place of contracting, i.e., the place where the last act necessary to give the contract binding effect occurred (comment e) and the place of negotiation where the parties negotiated and agreed on the terms of the contract. The Restatement attaches more importance to the latter than to the former, see Restatement 2d (1971), s. 188, comment e: "By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip" (p. 580).

660. *Entores, Ltd. v. Miles Far East Corporation*, (1955) 2 Q.B. 327 (C.A.); for the relationship of jurisdiction.

661. Ramsaizew, "La jurisprudence en matière de droit international privé de la Commission arbitrale soviétique pour le commerce extérieur", *Rev.crit.d.i.p.*, 1958, 459, 469.

662. Bugoslavski, II, 18; Lunz, *International Sale*, 36, is not quite clear.

663. Batiffol, *Contrats*, 78-85; *idem*, and Lagarde, II, No. 580-581.

664. See Rabel (-Drobnig), *Conflict*, II, 464-474, and the Rome Convention 1980, Art. 6 (employment contracts).

665. American UCC, s. 2-401 (2) and Restatement 2d (1971), s. 191, comment d.

666. Mann, *Legal Aspects of Money* (ed. 3), Oxford (1971), 205.

667. See Restatement 2d (1971), s. 188, comment e.

668. On the theory of the characteristic obligation, see Schnitzer, I, 52 and II, 639.

669. Jessurun d'Oliveira (313) and Juenger (77) maintain that any link

between the theory of the characteristic performance and what Juenger calls the "dark economic and sociological sciences" has not yet been established. However, the fact that these sciences have not yet paid any attention to the theory is not a valid reason to discard it. Besides, it is not so often that lawyers find support for their theories in an undivided economic and sociological doctrine.

670. Reithmann (-Martiny), 72 (banks), 466 (agents) (-Röper), 359 (forwarding agents), 366 (carriage of goods by land). See OLG, Hamburg, 30 May 1963, *IPRspr.*, 1962/63, No. 28: Contracts of sale concluded by an English seller of oil products with shipowners from different countries were all held to be governed by English law. One of the arguments of the courts was (p. 80): "There is here a form of contract which the BPT (the seller) habitually concludes with a substantial number of shipowners of different nationalities. They submit to a ready made legal order in identical terms. It is clear to the purchasers that the BPT wishes to treat all the contracts with its purchasers on an equal footing and this is possible only if the contract is governed by one legal system . . ." The same argument was employed in BGH, 24 June 1969, *IPRspr.*, 1968/69, No. 43, but see BGH, 19 September 1973, *IPRspr.*, 1973, No. 11. Art. 28 (2) of the New Introd. Law now establishes a clear presumption in favour of the law of the seller.

671. BG, 14 July 1951, BGE, 77, II, 278; see Vischer, *Vertragsrecht*, 112.

672. See Schwimann, 124.

673. Rep. RC. 282/20.

674. See *supra*, (ii) (1) on the *lex rei sitae* and (iii) (3) on the place of performance, and *infra*, (2) on the habitual residence of the consumer and the weak party.

675. The federal republics of West Germany, Austria and Switzerland are each one law district as far as the civil and commercial laws are concerned.

676. Cavers, *Critique* and *idem*, *Choice-of-Law Process*. "Judge Rhein-stein" in the fictional cases reported in *idem*, *Choice-of-Law Process*, 26, 32, 36; see now Restatement 2d (1971), 188 (2) (e).

677. See now the American Restatement 2d (1971), s. 188, comment e: "At least with respect to most issues a corporation's principal place of business is a more important contact than the place of incorporation . . ." (p. 581).

678. This is the solution adopted by some of the European countries: see Polish Act on Private International Law of 12 November 1965, Art. 27, para. 3; French Act on Business Associations (Loi No. 66-537 sur les sociétés commerciales) of 24 July 1966 (D.S., 1966, 265), Art. 3.

679. See also CISG, Art. 10 (a) and BGH, 2 June 1982, *IPRspr.*, 1982, No. 16: for the purpose of deciding whether the ULIS was applicable to a contract made between a German seller and a buyer whose principal place of business was in the United States and which had an establishment in the Netherlands the court, considering that the sale had been confirmed by the establishment in the Netherlands which had also paid the price and received the goods, decided that the ULIS was applicable.

680. See *supra*, (b) (iii) (2).

681. See *supra*, 2 (c) (iii) (5).

682. E.g., BFH, 26 March 1954, *IPRspr.*, 1954/55, No. 21.

683. Lando, *Kontraktstatuttet* (ed. 1, 1962), 308-309, 343.

684. Zitelmann, I, 89, and II, 366.

685. E.g., Thailand Act, Art. 13.

686. Morocco, Egypt and Syria, see *supra*, (b) (ii) (1); Portugal, see *supra*, (b) (i) (1).

687. E.g., French Cass.soc., 1 July 1964, *Rev.crit.d.i.p.*, 1966, 47, and earlier German cases, see Reithmann (-Martiny), 68.

688. On the arbitration in the *Aramco* and *Sapphire* cases see *Rev.crit.d.i.p.*, 1963, 272, and *Schw.Int.R.*, 20 (1963), 273, where the "general prin-

ciples of the law" were applied, see Verdross, "Zwei Schweizer Schiedssprüche über quasi-völkerrechtliche Verträge", *Schw.Jb.Int.R.*, 21 (1964), 15-24; Leve, *Le contrat dit sans loi: Travaux du Comité français de droit international privé 1964-1966* (Paris 1967), 209-243, Batiffol, "La sentence Aramco et le droit international privé", *Rev.crit.d.i.p.*, 1964, 647-662, and Lando, *Lex Mercatoria*, 747.

689. Cons. d'Etat, 11 January 1951, S. 1952.3.67.

690. Cass.civ., 31 May 1932, *Rev.crit.d.i.p.*, 1934, 909.

691. *Rex v. International Trustee Company for the Protection of Bondholders*, (1937) A.C. 500, 557 (H.L.).

692. *Ibidem*.

693. Cass.civ., 31 May 1932, *supra*, n. 690; Cour Paris, 10 April 1957, *Rev.crit.d.i.p.*, 1958, 120.

694. LAG, Hamburg, 11 August 1951, *IPRspr.*, 1945/53, No. 185; LAG, Düsseldorf, 12 July 1956, *IPRspr.*, 1956/57, No. 26.

695. PCIJ, 12 July 1929, *P.C.I.J.*, Ser. A, No. 20, 21; *Clunet*, 1929, 977.

696. England: see *Rex v. International Trustee Company*, *supra*, n. 691; Denmark: HD, 30 January 1939, UfR, 1939, A, 296; Norway: HD, 8 December 1937, NRt., 1937, 888; Sweden: HD, 30 January 1937, NJA, 1937, 1.

697. E.g., Trib. Seine, 1 June 1966, *Rev.crit.d.i.p.*, 1967, 715. The decision is criticized by Marthe Simon-Dépitre, *Rev.crit.d.i.p.*, 1967, 720; see also Batiffol and Lagarde, II, No. 577, and Mayer, "La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat", *Clunet*, 1986, 5.

698. Lunz, *IPR*, II, 61-64.

699. *Ibidem*, 40, 63.

700. There is a sliding transition from the tacit choice of law to the presumed intention. Apart from the former being based on a stronger inference from the conduct of the parties as to their intentions than the latter, it is impossible to differentiate between the conditions, and unprofitable to distinguish between the effects of the two.

701. On the terminology used, see *supra*, (a).

702. Denmark: HD, 13 December 1934, UfR, 1935, A, 82; HD, 30 January 1939, UfR, 1939, A, 296. For Norway and Sweden see *supra*, n. 696.

703. E.g., in the *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321 (C.A.).

704. E.g., Cass.civ., 5 December 1910, S. 1911.1.129.

705. See cases mentioned in Restatement 2d (1971), s. 203 (usury), Reporter's note, 654 ff.

706. Denmark: HD, 2 November 1903, UfR., 1904, B, 1; Sweden: HD, 5 June 1941, NJA, 1941, 350.

707. England: Dicey and Morris (-Collins) (ed. 10), 789, Rule 149; France: Batiffol and Lagarde, II, No. 597 (objet), No. 598 (cause) and No. 605 (conséquences légales de la volonté des parties); West Germany: Introductory Law, CC (1986), Art. 31; Switzerland: Vischer, *Vertragsrecht*, 199-200; United States: Restatement 2d (1971), s. 200 (Validity of Contracts in Respects Other than Capacity and Formalities), s. 202 (Illegality), Scoles and Hay, 692 ff., but see Ehrenzweig, *Treatise*, 465 (rule of validation). Scandinavia: Lando, *Kontraktstatuttet* (ed. 3), 1981, 237 ff.

708. See Francescakis in *Annuaire de l'Institut de droit international*, Vol. 56, 196. Mayer uses a different terminology for "les lois de police", see *Les lois de police*, 281, 301.

709. England: Dicey and Morris (-Morris) (ed. 9), 776, Rule 151, with reference to cases; not repeated in ed. 10. France: Batiffol and Lagarde, I, No. 251 and II, No. 576, with reference to cases; French courts sometimes invoke CC, Art. 3, para. I. West Germany: Introductory Law, CC (1986), Art. 34. United States: Restatement 2d (1971), s. 6 (1): "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law"; see also s. 6 (1), comments *a* and *b*.

710. See on this expression Francescakis, "Conflits de lois (principes généraux)", No. 122/146: *Encyclopédie Dalloz*, I, 480-481; note Struycken to Dutch Court of Cassation, 13 May 1966: *Rev.crit.d.i.p.*, 1967, 522. The French expression is: règles d'application immédiate, the Italian: norme di applicazione necessaria, see *Riv.dir.int.proc.*, 1964, 689. On exchange control regulations see *IECL*, Vol. III, Ch. 36, s. 15 (Van Hecke).

711. See the Brussels Protocol of 23 February 1968, Art. X.

712. Dicey and Morris (-Morris), ed. 10, Rule 157, 858.

713. Rabel (-Bernstein), *Conflict*, III, 325.

714. West Germany: Reithmann (-Martiny), 448; Gamillscheg, *Arbeitsrecht*, 187; see also BAG, 10 December 1964, *IPRspr.*, 1964/65, No. 69. France: Simon-Dépitre, "Travail", No. 12-25 in *Encyclopédie Dalloz*, II, 970-971; Batiffol and Lagarde, II, No. 576. United States: Rabel (-Bernstein), *Conflict*, III, 221, with n. 31 (Workmen's Compensation Statutes).

715. See on the United Kingdom Exchange Control Act, 1947 (10 & 11 Geo. 6, c. 14); Schmitthoff, *The Export Trade* (8 ed., London, 1986), 94 ff. On the French Act of 28 December 1966 (D. 1967, 30), and the French Decree of 27 January 1967 (D. 1967, 81), see Eck, "Change", No. 1-62 in *Encyclopédie Dalloz*, I, 296-301; on West Germany, Reithmann, 194.

716. See Schmitthoff (preceding note), 95, on the United Kingdom Act.

717. E.g., the West German Gesetz gegen Wettbewerbsbeschränkungen (Act Against Trade Restrictions) of July 1957 (BGBl., I, 1081), s. 98, para. 2, see also s. 6, paras. 1 and 2, Schwartz, *Deutsches Internationales Kartellrecht* (ed. 2, Cologne, Berlin, a.o. 1968). Reithmann (-Martiny), 189, BGH, 12 July 1973, *IPRspr.*, 1973, No. 116; OLG, Düsseldorf, 27 July 1982, *IPRspr.*, 1982 No. 125. On the French legislation, see Mezger, "Pratiques restrictives de la concurrence", No. 66-74 in *Encyclopédie Dalloz*, II, 612-613.

718. See Schwartz, "Anwendbarkeit nationalen Kartellrechts auf internationale Wettbewerbsbeschränkungen/Applicability of National Law on Restraints of Competition to International Restraints of Competition"; Institut für ausländisches und internationales Wirtschaftsrecht (ed.), *Kartelle und Monopole II/ Cartel and Monopoly in Modern Law II* (International Conference on Restraints of Competition at Frankfurt, 1960) (Karlsruhe 1961), 673-700, 701-726. On the rules drafted by the International Law Association in 1972 concerning the rights of a State or country to regulate anti-competitive conduct by rules enforceable by penal, quasi-penal or administrative sanctions, see the International Law Association (ed.), *Report on the Fifty-Fifth Conference* (London, 1972), 107 (Committee on the extra-territorial application of restrictive trade legislation). The draft resolution adopted by the majority of the committee members and by the 1972 Conference limits the jurisdiction of a State to prescribe rules governing anti-competitive conduct of an alien outside its territory having effect within its territory. Parts of the conduct being a "constituent element" of the offence must occur within the territory of the enacting State and the acts or omissions occurring outside its territory must also be "constituent elements" of the same offence; see Art. 3 of the draft (139).

719. See Rabel (-Drobnig), *Conflict*, II, 551.

720. There is a difference between the refusal to apply a foreign statute because it is in the nature of penal, revenue or generally of public law character and the refusal to apply it for reasons of public policy. Some countries which themselves have enacted similar public law rules could hardly refuse their application because they violate public policy. The concept of public policy has an ethical connotation. Public policy is therefore directed against the result of the application of the foreign rule not against the rule itself; see Madsen-Mygdal, II, 811.

721. West Germany: BGH, 28 October 1965, *IPRspr.*, 1964/65, No. 49; England: *Grell v. Levy*, (1864) 16 C.B. (N.S.) 73, 143 E.R. 1052.

722. England: *Saxby v. Fulton*, (1909) 2 K.B. 208 (C.A.); see Dicey and Morris (-Mann) (ed. 10), 85.

723. United States: *Oscanyon v. Winchester Arms Co.*, 103 U.S. 261 (1880).

724. England: *Foster v. Driscoll*, (1929) 1 K.B. 470 (C.A.); *Regazzoni v. K.C. Sethia, Ltd.*, (1958) A.C. 301 (H.L.); see Dicey and Morris (-Collins) (ed. 10), 805.

725. Francescakis in *Rev.crit.d.i.p.*, 1974, 273, 288.

726. Surveys of the theories are given by Schultze, 45, and by Mann, 185, see also Mayer, *Les lois de police*, 310. As for cases see: West Germany: BGH 17 December 1959, BGHZ, 31, 367 and *Rev.crit.d.i.p.*, 1961, 313; Switzerland: BG, 2 February 1954, BGE, 80, II, 53; France: Cass.civ., 16 October 1967, *Rev.crit.d.i.p.*, 1968, 661; but see Cass.civ., 16 June 1983, *Rev.crit.d.i.p.*, 1985, 85; Netherlands: Hof Amsterdam, 30 June 1938, N.J., 1939, No. 827.

727. Dicey and Morris (-Morris) (ed. 10), 1023, Rule 179.

728. England: *Rossano v. Manufacturers Life Insurance Co.*, (1963) 2 Q.B. 352, All E.R. 214, 225 E.G.; *Kahler v. Midland Bank*, (1950) A.C. 24 (H.L.); *Zivnostenska Bank National Corp. v. Frankman*, (1950) A.C. 57 (H.L.). Canada: *Imperial Life Assurance Co. of Canada v. Colmenares* (1967), 62 D.L.R.2d 138 (S. Ct. Can.). United States: *In Re Sik's Estate*, 205 Misc. 715, 129 N.Y.S.2d 134 (1954); *In Re De Gheest's Estate*, 243 S.W.2d 83 (Mo. 1951).

729. England: *Regazzoni v. K.C. Sethia, Ltd.*, *supra*, n. 724; *Ralli Bros. v. Compania Naviera Sota y Aznar*, (1920) 2 K.B. 287 (C.A.).

730. West Germany: see Reithmann, 239, and, e.g., BGH, 17 December 1959, *supra*, n. 726; Switzerland: Vischer, *Vertragsrecht*, 188, 191 and BG, 28 February 1950, BGE, 76 II, 33, 41. France: Eck, *Change*, No. 63-67 in *Encyclopédie Dalloz*, I, 301; Netherlands: see Hof Amsterdam, 30 June 1938, *supra*, n. 726.

731. England: *Rex v. International Trustee for the Protection of Bondholders*, (1937) A.C. 500 (H.L.). On Sweden and Norway, see *supra*, 3 (b) (ii) (1).

732. E.g., Sweden: HD, 5 June 1941, NJA, 1941, 350.

733. E.g., Drobnič, 263.

734. Vischer, *Vertragsrecht*, 192; see also van Hecke in *IECL*, Vol. 3, Ch. 36, ss. 16 and 17.

735. Wengler, "Die Anknüpfung des zwingenden Schuldrechts in IPR", *ZfVr*, 54 (1941), 168; Zweigert, *Leistungsverbote*, 283, 291 and *idem*, *Öffentliches Recht*, 128; see also Neumayer, "Autonomie de la volonté et dispositions impératives en droit international privé", *Rev.crit.d.i.p.*, 1958, 53; but see Vischer, *Vertragsrecht*, 192; Schultze, 80.

736. Zweigert states that the intention of the foreign legislator is to be recognized if his interests in applying the rule are typical in the international sphere (international-typische Interessen), see *idem*, *Leistungsverbote*, 291, and Rep. RC, 282/27.

737. Dicey and Morris (-Collins) (ed. 10), 794, Rule 149 (Exception 1); see also *Ralli Bros. v. Compania Naviera Sota y Aznar*, *supra*, n. 729, and *infra*, (c) (iii) (3) A.

738. West Germany: see Reithmann, 242 f.; RG, 28 June 1918, RGZ, 93, 182 and dictum in BGH, 28 January 1965, *IPRspr.*, 1964/65, No. 68; Zweigert, *Leistungsverbote*, 302. See also Madsen-Mygdal, I, 192, and Vischer, *Vertragsrecht*, 205. Swiss public policy, however, has frequently led to the enforcement of a clause of such a nature: "Whether foreign rules violating Swiss public policy are made applicable or indirectly are taken into consideration as fact amounts to the same thing", see BG, 18 September 1934, BGE, 60 II 294, 311. Netherlands: Hjernér, 521. United States: Restatement 2d (1971), 202, comment c (p. 646); England: Mann, "Proper Law and Illegality

in Private International Law", 18 *Brit. Y.B.Int.L.* 97-113 (1937), but see Dicey and Morris (-Collins) (ed. 9), 794, Rule 149 (exception 1).

739. On the theories concerning the application of foreign exchange control regulations see van Hecke, *IECL*, Vol. 3, Ch. 36, s. 17.

740. 27 December 1945, 2 *UNTS*, 39.

741. See van Hecke in *IECL*, Vol. 3, Ch. 36, s. 18, and the English case *Mansouri v. Singh*, (1984) New L.J. 991: Mansouri an Iranian, buys airline tickets in Iran with Iranian currency and sends them to Mrs. Mansouri in England. She agrees with Singh, a travel agent, that he will obtain a refund on the tickets and make sterling payments to her at double the official rate of exchange. Singh issues a post-dated cheque in favour of Mrs. Mansouri, but countermands it before it is presented. The transaction is a breach of Iranian exchange regulations and Iran is a Member of the International Monetary Fund. Mr. Mansouri's action against Singh on the cheque is dismissed.

742. See authors mentioned *supra*, 2 (c) (iii) (4).

743. See Gaudemet Tallon, No. 73, Mayer, Nos. 122-131, Rep. RC, 282/27.

744. See on Germany BGH, 30 January 1961, *IPRspr.*, 1960/61, No. 39 (b).

745. See on the Scandinavian cases *supra*, 3 (b) (ii) (1). England: *Rex v. International Trustee for the Protection of Bondholders*, (1937) A.C. 500 (H.L.).

746. United States: see on *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927), *supra*, 3 (b) (iii) (2), see also Ehrenzweig, *Treatise*, 458. England: *In Re Missouri Steamship Co.*, (1889) 42 Ch.D. 321. France: Cass. civ., 5 December 1910, S. 1911.1.321. Sweden: HD, 5 June 1941, NJA, 1941, 350.

747. *Boissevain v. Weil*, (1950) A.C. 327 (H.L.).

748. *Kahler v. Midland Bank, Ltd.*, *supra*, n. 728; *Etler v. Kertesz*, (1961) 26 D.L.R.2d 209 (Ontario, C.A., 1960); *Kleinwort, Sons & Co. v. Ungarische Baumwolle Aktien-Gesellschaft*, (1939) 2 K.B. 678 (C.A.); *De Beche v. South American Stores, Ltd.*, (1935) A.C. 148 (H.L.).

749. England: *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, (1939) A.C. 277; Netherlands: Hoge Raad, 13 May 1966, N.J. 1967, No. 3; Denmark: Søl og Handelsretten, Copenhagen, 12 February 1957, Ufr, 1957, A, 807; West Germany: OLG, Hamburg, 9 July 1957, *IPRspr.*, 1956/57, No. 56 b; France: Jambu-Merlin, "Transports maritimes", *Encyclopédie Dalloz*, II, No. 44.

750. Hoge Raad, 13 May 1966, N.J., 1967, No. 3 (p. 21).

751. What will happen when a court attempts to require, subject to penalties, a certain behaviour to be followed by an enterprise in a foreign country which is contrary to the duties of that enterprise according to the law of that country is illustrated in *British Nylon Spinners v. I.C.I.*, (1955) Ch. 37 and *U.S. v. I.C.I.*, 100 F.Supp. 504 (S.D.N.Y., 1951), 105 F.Supp. 215 (S.D. N.Y., 1952), see Ergec, *La compétence extraterritoriale à la lumière du contentieux sur le gazoduc Euro-Sibérien*, Brussels, 1984, and Audit, *L'Affaire du gazoduc*, 417.

752. See also *supra*, 2 (c) (iii) (5) and 3 (c) (iii).

753. But see Hoge Raad, 13 May 1966, N.J., 1967, n. 3 (p. 27), where the Dutch Supreme Court spoke *obiter* in favour of taking into account mandatory rules enacted by a country other than that of the proper law of the contract.

754. See *supra*, 2 (c) (ii).

755. Vischer, *Vertragsrecht*, 183; Schultze, 32, gives a survey of the theories.

756. See on exchange control regulation van Hecke, *I.E.C.L.*, Vol. 3, Ch. 36, s. 16.

757. See Rechtsbank, The Hague, 17 September 1982, *Rev.crit.d.i.p.*, 1982, 473, and Audit, *L'affaire du Gazoduc*, 417.

758. Zweigert, *Leistungsverbote*, 288, 291 and *idem*, *Öffentliches Recht*, 128, 131, 140.

759. See Reithmann (-Martiny), 242, 244, the cases cited by van Hecke; *I.E.C.L.*, Vol. 3, Ch. 36, n. 148; see also French Cass. civ., 18 June, *Rev.crit.d.i.p.*, 1985, 85 (effect given to prohibition against strikes at the place of work).

760. See Zweigert, *Leistungsverbote*, 288.

761. Zweigert, *Leistungsverbote*, 302.

762. Van Hecke is of the opinion that only the currency restrictions of the proper law should apply. The proper law, however, should embody the provision that the currency restrictions of the *lex patrimonii* should be taken into account, see *I.E.C.L.*, Vol. 3, Ch. 36, s. 17, but see *supra*, at Illustration (4). The rule suggested by van Hecke, it is feared, will block the consideration of the *lex patrimonii* in cases where such a substantive rule had not (yet) been introduced into the law of the *lex contractus*.

763. See Mayer, *Les lois de police*, 310 ff.

LIST OF PRINCIPAL WORKS

- Almén, *Om köp och byte av lös egendom* (ed. 2, Stockholm, 1917) (ed. 4, Stockholm, 1960).
- American Law Institute (ed.), *Restatement of the Law of Conflict of Laws* (Washington, D.C., 1934), cited *Restatement (1934)*.
- American Law Institute (ed.), *Restatement of the Law Second. Conflict of Laws* (3 vols.) (St. Paul, Minn., 1971), cited *Restatement 2d (1971)*.
- Ansary, *American-Turkish Private International Law* (Bilateral Studies in Private International Law No. 16) (Dobbs Ferry, N.Y., 1966).
- Anton, *Private International Law. A Treatise from the Standpoint of Scots Law* (Edinburgh, 1967).
- Audit, "Extra-territorialité et commerce. L'affaire du gazoduc sibérien", *Riv. crit.d.i.p.*, 1983, 401.
- Ballarino, *Diritto internazionale privato* (Padua, 1982).
- Batiffol, *Les conflits de lois en matière de contrats* (Paris, 1938), cited *Contrats*.
- , *Public Policy and the Autonomy of the Parties. Interrelation Between Imperative Legislation and the Doctrine of Party Autonomy* (Lectures on the Conflict of Laws and International Contracts, 1949) (Ann Arbor, Mich., 1951), 68-81, cited *Ann Arbor Lectures*.
- , "Subjectivisme et objectivisme dans le droit international privé des contrats", *Mélanges Jacques Maury*, I (Paris, 1961), 39-58, cited *Mélanges Maury*.
- , "Contrats et conventions", *Encyclopédie Dalloz (infra)*, I, 562-573, cited *Contrats et Conventions*.
- Batiffol & Lagarde, *Droit international privé* (2 vols.) (ed. 7, Paris, 1981-1983).
- Beale, *A Treatise on the Conflict of Laws* (3 vols.) (New York, 1935).
- Becker, *Die Rechtsprechung der sowjetischen Aussenhandelsschiedskommission* (Cologne, 1964).
- Bogdan, *Svensk internationell privat- och processrätt*, 2. ed. (Malmö, 1985).
- Boguslovskij, *Internationales Privatrecht*, I-II (oversat fra russisk i "Akademie für Staats- und Rechtswissenschaft der DDR", Institut für Ausländisches Recht und Rechtsvergleichung) Postdam-Babelsberg, 1976.
- Borum and Philip, *Lovkonflikter* (ed. 4, Copenhagen, 1957).
- Capatina, "Die Aussenhandelsverträge über den Kauf von Waren im rumänischen internationalen Privatrecht", *RabelsZ*, 37 (1973), 36-60.
- Carnahan, *Conflict of Laws and Life Insurance Contracts* (ed. 2, Buffalo, N.Y., 1958).
- Cavers, "A Critique of the Choice of Law Problem", 47 *Harv.L.Rev.*, 197-208 (1933), cited *Critique*.
- , *The Choice-of-Law Process* (Ann Arbor, Mich., 1965), cited *Choice-of-Law Process*.
- Cheshire, *Private International Law* (ed. 5, Oxford, 1957) (ed. 6, Oxford, 1961) (ed. 7, London, 1965).
- Cheshire and North, *Cheshire's Private International Law* (ed. 9, London, 1974) (ed. 10, London, 1979).
- Cheshire (-North), *Cheshire's Private International Law* (ed. 8, London, 1970).
- Chitty (-Guest, a.o.), *Chitty on Contracts* (2 vols.) (ed. 25, London, 1983, 1968).
- Colin & Capitant (-Julliot de la Morandière), *Cours élémentaire de droit civil français*, II (Paris, 1953).

- Conseil fédéral suisse, Message concernant une loi fédérale sur le droit international privé du 10 novembre 1982, Berne, 1982, cited *Message*.
- Cook, *The Logical and Legal Basis of the Conflict of Laws* (Cambridge, Mass., 1942).
- Corbin, *Corbin on Contracts* (St. Paul, Minn., 1951).
- Cowen, *American-Australian Private International Law* (Bilateral Studies in Private International Law, No. 8) (New York, 1957).
- Cromton, Currie and Kay, *Conflict of Laws, Cases, Comments, Questions* (ed. 3, St. Paul, Minn., 1981).
- Currie, *Selected Essays on the Conflict of Laws* (Durham, N.C., 1963).
- Deelen, *Rechtskeuze in het Nederlands internationaal contractenrecht* (Amsterdam, 1965).
- Delaume, *American-French Private International Law* (Bilateral Studies in Private International Law, No. 2) (ed. 2, New York, 1961).
- Dicey and Morris (-Morris, a.o.), *Dicey and Morris on the Conflict of Laws* (ed. 8, London, 1967) (ed. 9, London, 1973) (ed. 10, London, 1980, with suppl.).
- Donnedieu de Vabres, *L'évolution de la jurisprudence française en matière de conflit des lois depuis le début du XX^e siècle* (Paris, 1938).
- Drobnig, *American-German Private International Law* (Bilateral Studies in Private International Law, No. 4) (ed. 2, Dobbs Ferry, N.Y., 1972).
- Duchek-Schwind, *Internationales Privatrecht* (Vienna, 1979).
- Eder, *American-Colombian Private International Law* (Bilateral Studies in Private International Law, No. 5) (New York, 1956).
- Eek, *The Swedish Conflict of Laws* (Stockholm, 1965), cited *Swedish Conflicts*.
- , *Svensk eller utländsk lag? Exporträtt 4* (Stockholm, 1970), cited *Exporträtt*.
- Ehrenzweig, "Adhesion Contracts in the Conflict of Laws", 53 *Colum. L. Rev.*, 1072-1090 (1953), cited *Adhesion Contracts*.
- , *A Treatise on the Conflict of Laws* (St. Paul, Minn., 1962), cited *Treatise*.
- Ehrenzweig, Fragistas and Yiannopoulos, *American-Greek Private International Law* (Bilateral Studies in Private International Law, No. 6) (New York, 1957).
- Ehrenzweig, Ikehara and Jensen, *American-Japanese Private International Law* (Bilateral Studies in Private International Law, No. 12) (Dobbs Ferry, N.Y., 1964).
- Encyclopédie Dalloz, *Répertoire de Droit International I* (Paris, 1968), II (Paris, 1969), cited *Encyclopédie Dalloz*.
- Etcheberry, *American-Chilean Private International Law* (Bilateral Studies in Private International Law, No. 10) (New York, 1960).
- European Communities' Convention on the Law Applicable to Contractual Obligations of 19th June 1980, *OJEC*, No. L 266/1, 9 October 1980 (80/934 EEC), cited *Rome Convention*, or *1980 RC*.
- Gaarder, *Innføring i internasjonal privatrett* (Oslo, 1973).
- Gamillscheg, *Der Einfluss Dumouilins auf die Entwicklung des Kollisionsrechts* (Beiträge zum ausländischen und internationalen Privatrecht, No. 25) (Berlin and Tübingen, 1955), cited *Einfluss*.
- , *Internationales Arbeitsrecht. Arbeitsverweisungsrecht* (Beiträge zum ausländischen und internationalen Privatrecht, No. 27) (Berlin and Tübingen, 1959), cited *Arbeitsrecht*.
- , "Rechtswahl, Schwerpunkt und mutmasslicher Parteiwille im internationalen Vertragsrecht", *AcP*, 157 (1958), 303-41, cited *Rechtswahl*.
- Garland, *American-Brazilian Private International Law* (Bilateral Studies in Private International Law, No. 9) (New York, 1959).
- Gaudemet-Tallon, "Nouveau droit international privé européen des contrats", *Rev. trim. dr. eur.*, 1981 (17), 215.
- Genkin (ed.), *Der Aussenhandel und seine rechtliche Regelung in der U.S.S.R.* (Berlin, 1963).
- Gesellschaft für Rechtsvergleichung (ed.), *Richterliche Kontrolle von allge-*

- meinen Geschäftsbedingungen* (Arbeiten zur Rechtsvergleichung, No. 41) (Frankfurt und Berlin, 1968).
- Gjelsvik, *Millomfolkeleg Privatrett* (ed. 2, Oslo, 1936).
- Goldschmidt and Rodriguez-Novas, *American-Argentine Private International Law* (Bilateral Studies in Private International Law, No. 15) (Dobbs Ferry, N.Y., 1966).
- Graveson, *Conflict of Laws. Private International Law* (ed. 7, London, 1974).
- Hague Conference on Private International Law, Extraordinary Session on the Law Applicable to Contracts for the International Sale of Goods, The Hague, 30 October, 1985, cited *Hague Sales Convention 1985* or 1985 HC.
- Harper, Taintor, Carnahan and Brown, *Conflict of Laws. Cases and Materials* (Indianapolis, 1950), cited *Harper a.o.*
- Hartweg, *Der renvoi im deutschen internationalen Vertragsrecht* (Arbeiten zur Rechtsvergleichung, No. 34) (Frankfurt und Berlin, 1967).
- Haudek, *Die Bedeutung des Parteiwillens im internationalen Privatrecht* (Rechtsvergleichende Abhandlungen, VII) (Berlin, 1931).
- Hjeile, *Frivillig Voldgift* (ed. 2, Copenhagen, 1973).
- Hjerner, *Främmande valutalag och internationell privaträtt* (Stockholm, 1956).
- Jessurun d'Oliveira, "'Characteristic Obligation' in the Draft EEC Obligation Convention", *Am. J. Comp. L.*, 25 (1977), 303-331.
- Juenger, "Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht", *RabelsZ*, 46 (1982), 58.
- Karlgrén, *Internationell privat- och processrätt* (ed. 3, Lund, 1966).
- Kegel, *Internationales Privatrecht* (ed. 4, Munich, 1977), cited *IPR*.
- Kent, *Commentaries on American Law*, II (ed. 14, Boston, 1896).
- Kimball, "Legislative and Judicial Control of the Terms of Insurance Contracts", 39 *Ind. L. J.*, 675-731 (1964).
- Kimball and Pfennigstorf, *Allgemeine Versicherungsbedingungen unter Staatsaufsicht* (Karlsruhe, 1968).
- Klami, *Private International Law in Finland*, Publications of the Faculty of Law of the University of Turku, *The Private Law Series*, A 57 (Turku, 1986).
- Köhler, *Internationales Privatrecht* (ed. 3, Vienna and New York, 1966).
- Kollewijn, *American-Dutch Private International Law* (Bilateral Studies in Private International Law, No. 3) (ed. 2, New York, 1961).
- Kreuzer, *Das internationale Privatrecht des Warenkaufs in der deutschen Rechtsprechung* (Arbeiten zur Rechtsvergleichung, No. 21) (Frankfurt, 1964).
- Lainé, *Introduction au droit international privé* (2 vols.) (Paris, 1888, 1892).
- Lando, "Contacts for International Contracts. American and Scandinavian Conflict Rules Compared: *Ius privatum gentium*", *Festschrift Max Rheinstein*, I (Tübingen, 1969), 383-397, cited *Contacts*.
- , *Kontraktstatuttet. The Proper Law of the Contract* (ed. 3, Copenhagen, 1981), cited *Kontraktstatuttet*.
- , *The Proper Law of Contract*: Scand. Stud. L. 8 (1964), 105-202, cited *Proper Law*.
- , *Udenrigshandelsret*, I (Udenrigshandelens Kontrakter) (ed. 3, Copenhagen, 1980), cited *Udenrigshandelsret I*.
- , "Scandinavian Conflict of Law Rules respecting Contracts", 6 *Am. J. Comp. L.*, 1-26 (1957), cited *Scandinavian*.
- , "The EC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations", *RabelsZ*, 38 (1974), 6-55, cited *EC Draft*.
- , "The *Lex Mercatoria* in International Commercial Arbitration", 34 *ICLQ*, 747 (1985), cited *Lex Mercatoria*.
- , "Conflict-of-law Rules for Arbitrators", *Festschrift für Konrad Zweigert* (Tübingen, 1981), 157.
- , "Contracts" in *International Encyclopedia of Comparative Law*, Vol. III, Chapter 24 (Tübingen, 1976), cited *Lando, IECL*.
- Lando, von Hoffmann and Siehr (ed.), *European Private International Law of*

- Obligations* (Materialien zum ausländischen und internationalen Privatrecht, No. 23) (Tübingen, 1975).
- Leflar, *American Conflicts Law* (ed. 3, Indianapolis et al., 1977).
- Lerebours-Pigeonnière, *Précis de droit international privé* (ed. 5, Paris, 1948), (ed. 6, Paris, 1954), (ed. 9, Paris, 1970).
- Lew, *Applicable Law in International Commercial Arbitration* (New York, 1978).
- Lewald, *Das deutsche internationale Privatrecht auf der Grundlage der Rechtsprechung* (Leipzig, 1931).
- Lombard, *American-Venezuelan Private International Law* (Bilateral Studies in Private International Law, No. 14) (New York, 1965).
- Lorenzen, *Selected Articles on the Conflict of Laws* (New Haven and London, 1947).
- Loussouarn & Bredin, *Droit du commerce international* (Paris, 1969).
- Lunz, "Conflict of Laws in International Sale — Theory and Practice of Socialist Countries", *Collected Courses*, 114 (1965-I), 5-51, cited *International Sale*.
- , *Internationales Privatrecht* (2 vols.) (Berlin, 1961-1964), cited *IPR*.
- Madl, *Foreign Trade Monopoly. Private International Law* (Budapest, 1967).
- Madsen-Mygdal, *Ordre public og territorialitet* (2 vols.) (Copenhagen, 1946).
- Makarov, *Quellen des internationalen Privatrechts*, 3 ed., Tübingen, 1978 (edited by Neuhaus and others), *Materialien zum ausländischen und internationalen Privatrecht* 2.
- , *Recueil de textes concernant le droit international privé/Quellen des internationalen Privatrechts*, I (Textes des lois/Gesetzestexte), II (Textes des traités internationaux/Texte der Staatsverträge) (ed. 2, Berlin and Tübingen, 1953-1961), cited *Makarov I and II*.
- Mann, "Conflict of Laws and Public Law", *Collected Courses*, 132 (1971-I), 107-196.
- Max-Planck-Institut für ausländisches und internationales Privatrecht (ed.), *Die Anwendung ausländischen Rechts im internationalen Privatrecht* (Materialien zum ausländischen und internationalen Privatrecht, No. 10) (Berlin and Tübingen, 1968), cited *MPI, Anwendung*.
- , *Die materielle Gültigkeit von Kaufverträgen* (Materialien zum ausländischen und internationalen Privatrecht, No. 9) I-II (Berlin and Tübingen, 1968), cited *MPI, Materielle Gültigkeit*.
- Mayer, *Droit international privé*, ed. 2 (Paris, 1983).
- , "Les lois de police étrangères", *Clunet*, 1981, 277.
- Message concernant une loi fédérale. See *Conseil fédéral suisse*.
- Miaja de la Muela, *Derecho internacional privado*, III (Madrid, 1967).
- Michaeli, *Internationales Privatrecht* (Stockholm, 1948).
- Morris, *The Conflict of Laws* (London, 1971), cited *Conflict*.
- , "The Proper Law of a Contract — A Reply", 3 *ILQ*, 197-207 (1960), cited *Proper Law*.
- Moser, *Vertragsabschluss, Vertragsgültigkeit und Parteiwille im internationalen Obligationenrecht* (St. Gallen, 1948).
- MünchKomm (Martiny or other author), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Einführungsgesetz, Internationales Privatrecht*, Vol. 7 (Munich, 1983).
- Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* (ed. 2, Tübingen, 1976).
- Nial, *American-Swedish Private International Law* (Bilateral Studies in Private International Law, No. 13) (New York, 1965), cited *American-Swedish*.
- , *Internationell förmögenhetsrätt* (ed. 2, Stockholm, 1953), cited *förmögenhetsrätt*.
- Niboyet, *Cours de droit international privé français* (ed. 2, Paris, 1948), cited *Cours*.

- , *Traité de droit international privé français*, I (ed. 2, Paris, 1947), III (Paris, 1944), V (Paris, 1948), cited *Traité*.
- , "La théorie de l'autonomie de la volonté", *Rec. des cours*, 16 (1927-I), 5-114, cited *L'autonomie*.
- Nussbaum, *Principles of Private International Law* (New York, 1943), cited *PIL*.
- , *Deutsches Internationales Privatrecht* (Tübingen, 1932), cited *IPR*.
- , *American-Swiss Private International Law* (Bilateral Studies in Private International Law, No. 1) (ed. 2, New York, 1958), cited *American-Swiss*.
- Nygh, *Conflict of Laws in Australia* (ed. 3, Sydney, 1976).
- Pfaff, *Die Aussenhandelsschiedsgerichtsbarkeit der sozialistischen Länder im Handel mit der Bundesrepublik Deutschland* (Heidelberg, 1973).
- Philip, *American-Danish Private International Law* (Bilateral Studies in Private International Law, No. 7) (New York, 1957), cited *American-Danish*.
- , *Dansk International Privat- og Procesret* (3rd ed., Copenhagen, 1976), cited *Dansk*.
- Pillet, *Principes de droit international privé* (Paris and Grenoble, 1903), cited *Principes*.
- , *Traité pratique de droit international privé*, II (Paris and Grenoble, 1924), cited *Traité*.
- Pillet and Niboyet, *Manuel de droit international privé* (Paris, 1924).
- Raape, *Internationales Privatrecht* (2 vols.) (Berlin and Frankfurt, 1938-1939), cited *IPR I or II*.
- , *Internationales Privatrecht* (ed. 5, Berlin and Frankfurt 1961), cited *IPR*.
- Rabel, *Das Recht des Warenkaufs*, I (Berlin and Leipzig, 1936), II (Berlin and Tübingen, 1958), cited *Warenkauf*.
- , *The Conflict of Laws - A Comparative Study*, I (ed. 2 by Drobnig, Ann Arbor, 1958), II (ed. 2 by Drobnig, Ann Arbor, 1960), III (ed. 2 by Bernstein, Ann Arbor, 1964), IV (Ann Arbor, 1958), cited *Conflict*.
- Ramsaizew, *Die Aussenhandelsarbitrage in der UdSSR* (Berlin, 1961).
- Reese and Rosenberg, *Cases and Materials on Conflict of Laws* (ed. 7, Mineola, N.Y., 1978).
- Reithmann, *Internationales Vertragsrecht* (ed. 3, Cologne, 1980).
- "Report on the Convention on the Law Applicable to Contractual Obligations by M. Guiliano and P. Lagarde (1980)", *OJEC*, No. C 282/1, 31.10.1980, cited *Rep. RC*.
- Restatement (1934) and Restatement 2d (1971), see American Law Institute.
- Rigaux, *Droit international privé*, I-II (Brussels, 1979).
- Ross, *Om Ret og Retfærdighed* (Copenhagen, 1953).
- Sarcevic, "The Law Applicable to Contractual Obligations according to the New Yugoslav Act concerning Private International Law", in *Current Trends of Conflicts of Laws in Central-Eastern Europe*, Trieste, 1984, 125-135.
- Sauveplanne, *Elementair internationaal Privaatrecht* (ed. 7, 1982), Deventer.
- Schmitthoff, *The Export Trade* (ed. 8, London, 1986), cited *Export Trade*.
- , *The English Conflict of Laws* (ed. 3, London, 1954), cited *Conflict*.
- Schnitzer, *Handbuch des Internationalen Privatrechts*, I, II (ed. 4, Basle, 1957-1958).
- Schultze, *Das öffentliche Recht im internationalen Privatrecht* (Arbeiten zur Rechtsvergleichung, No. 57) (Frankfurt, 1972).
- Schwimmann, *Grundriss des internationalen Privatrechts* (Vienna, 1982).
- Scoles and Hay, *Conflict of Laws*, St. Paul, Minn., 1982.
- Seidl-Hohenveldern, *American-Austrian Private International Law* (Bilateral Studies in Private International Law, No. 11) (Dobbs Ferry, N.Y., 1963).
- Siesby, *Søretlige Lovkonflikter* (Copenhagen, 1965).
- , *Lærebog i international privatret, almindelig del og formueret* (Copenhagen, 1983).

- Soergel and Siebert (-Kegel), *Kommentar zum Bürgerlichen Gesetzbuch VII (Einführungsgesetz)* (ed. 10, Stuttgart, a.o., 1970).
- Statutory PIL, see *infra*, T.M.C. Asser Instituut.
- Steindorff, *Sachnormen im internationalen Privatrecht* (Frankfurt, 1958).
- Story, *Commentaries on the Conflict of Laws* (Boston, 1834) (ed. 3, Boston, 1846) (ed. 5, Boston, 1857) (ed. 8, Boston, 1883).
- Százy, *Private International Law in the European People's Democracies* (Budapest, 1964).
- T.M.C. Asser Instituut voor Internationaal Recht (ed.), *Statutory Private International Law/Les législations de droit international privé* (Oslo, 1971), cited *Statutory PIL*.
- Troller, *Das internationale Privat- und Zivilprozessrecht im gewerblichen Rechtsschutz und Urheberrecht* (Basle, 1952).
- Van Hecke, *American-Belgian Private International Law* (Bilateral Studies in Private International Law, No. 17) (Dobbs Ferry, N.Y., 1968).
- Vander Elst and Weser, *Droit international privé belge, I. Conflits de lois* (Brussels, 1983).
- Vischer, "Internationales Privatrecht", Gutzwiller (ed.), *Schweizerisches Privatrecht*, I (Basle and Stuttgart, 1969), 509-709, cited *IPR*.
- , *Internationales Vertragsrecht* (Berne, 1962), cited *Vertragsrecht*.
- Vitta, *Diritto internazionale privato*, III (Turin, 1975).
- von Bar, *Theorie und Praxis des internationalen Privatrechts* (2 vols.) (ed. 2, Hannover, 1889).
- von Mehren and Trautman, *The Law of Multistate Problems* (Boston, 1965).
- von Savigny, *System des heutigen römischen Rechts*, VIII (Berlin, 1849).
- von Sprecher, *Der internationale Kauf* (Chur, 1957).
- Wahler, *Die Aussenhandels- und See-Schiedsgerichtsbarkeit in der UdSSR* (Berlin, 1974).
- Weintraub, *Commentary on the Conflict of Laws* (ed. 2, Mineola, N.Y., 1980).
- Weiss, *Le droit international privé* (ed. 9, Paris, 1925).
- Weitnauer, *Der Vertragsschwerpunkt* (Arbeiten zur Rechtsvergleichung, 105, Frankfurt am Main, 1981).
- Westlake, *Private International Law* (ed. 4, London, 1905) (ed. 5, London, 1912).
- Wirtschaftliche und wissenschaftliche — technische Zusammenarbeit der RWG-Länder, *Dokumente*, Berlin 1981 (published by the Institut für ausländisches Recht und Rechtsvergleichung and der Akademie für Staats- und Rechtswissenschaft der DDR, Potsdam-Babelsberg), cited *RWG Doc*.
- Wolff, *Das internationale Privatrecht Deutschlands* (ed. 3, Berlin, a.o., 1954), cited *IPR* (1954).
- , *Internationales Privatrecht* (Berlin, 1933), cited *IPR* (1933).
- , *Private International Law* (ed. 2, Oxford, 1950), cited *PIL*.
- Ziegel, "Conditional Sales and the Conflict of Laws", 45 *Can. Bar Rev.*, 284-334 (1967).
- Zitelmann, *Internationales Privatrecht* (2 vols.) (Leipzig, 1897-1912).
- Zweigert, *Internationales Privatrecht und öffentliches Recht: Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel No. 51, Hamburg, 1965), 124-141, cited *Öffentliches Recht*.
- , "Nichterfüllung auf Grund ausländischer Leistungsverbote", *RabelsZ*, 14 (1942), 283-307, cited *Leistungsverbote*.
- , "Zum Abschlussort schuldrechtlicher Distanzverträge", *Festschrift Ernst Rabel* (Tübingen, 1954), 631-654, cited *Distanzverträge*.
- Zweigert & Kötz, *Einführung in die Rechtsvergleichung* (ed. 2, Tübingen, 1984).
- Ørsted, "Håndbog over de grundsætninger, hvorefter vore domstole kunne tage fremmede love i betragtning", *Eunomia*, IV (1822).