THE PROPER LAW OF THE CONTRACT

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§ 1. INTRODUCTION

I. The Problems

The objects of this paper are to give an account of the conflict of law rules respecting contracts as laid down in the case law and proposed by the jurists of France, Germany, England, U.S.A., and the Scandinavian countries, and on this basis to suggest methods and rules for Scandinavian courts. The main problems discussed in this paper are as follows:

(1) Is the contract to be governed by a unitary law or should there be practised a *dépeçage*[1] allowing, for instance, questions of formation, validity and interpretation to be governed by the law of one jurisdiction and questions of performance by another? Does one law also govern the obligations of both parties to a bilateral contract or should the courts practise a *"splitting up"*[2] of the contract as a result of which the obligations of each party would be governed by a separate law, such as the law of the place of his performance or the law of his domicile?

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

In discussing this question, it is convenient to introduce a distinction between two types of party reference or choice of law, which has been made in the German doctrine[3] and which has also figured largely in Scandinavian writings.[4]

Party autonomy, as here understood, refers to an express or tacit choice of law which constitutes the contact that makes such law applicable. The choice derives its validity from the conflict rules

[1] See Swiss BGE II 78 (1952): *coupure générale,* Batiffol, p. 323: *morcellement.*

[2] Swiss: *Coupure spéciale,* German: *Spaltung* see Gamillscheg, *Arbeitsrecht,* p. 104.

[3] Haudek, pp. 2 ff.

[4] Borum, p. 146, Hjejle, p. 180, Nial, p. 11, Karlgren, p. 95.

of the forum, and it may therefore be called a party reference in conflict of laws.[5]

This conception is to be distinguished from what may be called *incorporation* of foreign law.[6] According to the proper law of a contract, the parties may shape the contract as they desire within the limits set by mandatory rules of the proper 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, which they seek to apply wholly or partially. The latter is an incorporation 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, not from the conflict rules of the forum.

The difference between the two types of party reference becomes relevant when one is determining 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 refer to another system. If there is party autonomy, the mandatory requirements of other legal systems than that selected by the parties are disregarded; if not, the mandatory rules of the proper law of the contract designated by the conflict rules of the forum apply, and the reference is then reduced to an incorporation of the law selected.

To a common-law jurist the distinction may seem conceptualistic. However, it has its merits; 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 reference in the conflict of laws. There can be no objection to party reference to 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 what the substantive rules of that law allow.

(3) In cases where there is no valid party reference to a law, should the courts find the law by applying *fixed rules,* such as the rules laid down in Chapter 8 of the first edition of the American Restatement of the Conflict of Laws, or should they, as proposed in the 6th draft (1960) of the same chapter of the Restatement of

[5] German: *Kollisionsrechtliche Parteiverweisung,* see Haudek, p. 4.
[6] German: *Materiellrechtliche Parteiverweisung,* see Haudek, p. 3.

the Conflict of Laws, Second,[7] adopt a more *flexible* method, for instance the so-called "centre of gravity method" or the "pragmatic method" favoured by David F. Cavers in his famous "Critique of the Choice of Law Problem"?[8]

Should the courts, especially where they have adopted the flexible method, try to follow the *intentions or interests of the parties,* or should they attach more weight to other social considerations, in other words to the *interests of society?*

In this paper, the *subjective method* denotes the search for the intentions and interests of the parties in the concrete case before the court or the average interests of parties in situations analogous to the one before the court. An evaluation which only follows the interests of society without special regard to the interests or intentions of the parties is here called the *objective method.*

When paying regard to the interests of society the courts will look at those contacts which are here termed *local.* Local contacts 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* of the contract, e.g. the situation of a movable or immovable, the filing of a transaction in a public register, or (3) the *parties* to the contract, their residence, their domicile or their nationality. These contacts—for example with 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.

Other relationships between a contract and a legal system have significance only in so far as they may denote the interests of the parties in applying that law. Among them may be mentioned a jurisdiction clause, an agreement upon a certain place as the place of contracting or the place of performance, and the use of a certain formula or the legal terminology of a certain country. These relationships are here called the *subjective contacts.*

This terminology, local *contacts* as opposed to subjective contacts and objective *method* as opposed to subjective method, has been used in order to avoid a confusion created by some authors who assert that the law of the contract may exclusively be found by what they call an "objective" method and that the parties'

[7] Restatement of the Law, Second, Conflict of Laws, Tentative Draft No. 6. Chapter 8, Contracts, American Law Institute, Philadelphia, April 22, 1960.

[8] David F. Cavers, "A Critique of the Choice of Law Problem", 47 *Harvard Law Review* (1933), pp. 173 ff.

intention should be left out of consideration.[9] On the other hand they call it an objective method to be guided by those contacts which may indicate both the interests of society and the interests of the parties in the application of a certain law.

II. The Approach

Batiffol asserts that his theory about the parties' autonomy is based on case law.[1] My situation, however, is that cases have shown me only trends and the trends have led me to establish a few theses. But compared with the theories of Batiffol and other authors these theses are of limited scope. I have found no basis either in the cases or elsewhere for any theory capable of explaining the whole field of the conflict of laws respecting contracts. Consequently it has not been the purpose of this study to establish and defend a theory but to explain certain chief points and to find rules which are thought to be applicable by Scandinavian courts. The rules are based upon various considerations. Among them, however, there are some to which in this paper great importance is attached, greater importance than that attributed to them by the majority of decided cases.

I consider it important to limit costs and risks in the international exchange of goods and services, and I therefore aim at certainty and predictability. In international contracts this predictability is obtainable only if the courts of all countries strive to establish conflict-of-law rules ensuring uniformity of result,[2] which means that the rules must be the same everywhere and must be rules which give foreign substantive law the same scope of application as the substantive law of the forum.

It is a primary object of all substantive law of contract to achieve certainty and predictability. This consideration must also guide the conflict-of-law rules. International contracts may very often lead to litigation in several countries; the forum is then not predictable at the time of the making of the contract. This uncertainty can be eliminated for the parties if uniform conflict rules are applied in each country.

[9] See, e.g., Cheshire, pp. 208 ff., Morris, pp. 197 ff.
[1] Batiffol, p. 2.
[2] See to the same effect Restatement Second, p. 2.

Several authors have opposed uniformity.[3] They have asserted that the conflict rules of each country should be framed in close harmony with the substantive law rules of the forum.[4] The conflict rules of the forum are part of the law of the sovereign state and should serve the policies of that state. Consequently the special policies of the substantive law of each country must shape its conflict rules.

This attitude is generally ill suited to the conflict-of-laws of contract. There are some differences between the substantive laws which will make it impossible to achieve complete uniformity, but they are exceptions. The laws in Scandinavia and in the countries with which Scandinavia has its closest commercial relationships are not basically different. The contract laws have admittedly drifted somewhat apart since the days when Roman law prevailed. The disparities may have increased since 1849 when the German jurist von Savigny published volume 8 of his *System des heutigen römischen Rechts,* a book advocating uniformity which influenced the conflict of laws of Europe and the U.S.A. But there is still, as Savigny thought, a broad common basis. The types of contracts are basically the same everywhere, and they serve the same purposes.[5] The substantive rules respecting sales, carriage of goods and persons, insurance, agency, loans of money, etc., are also still so similar from country to country that common conflict rules can be established regardless of the differences in the substantive laws. It would not be possible, as Savigny believed, to establish one common set of conflict rules respecting *all* contracts. But it would be possible to establish a common set of rules for the different types of contract.

It is generally of no great political importance whether the courts apply to a sale of goods or to some other mercantile contract the law of the domicile of the seller, the law of the place of contracting, or the law of the place of performance. This is not even as important as the question whether a state should apply the law of the domicile or the national law to matters of divorce or inheritance. In cases concerning carriage of goods and persons by sea, however, many courts have felt that a question of public policy is involved. The result of this has been a frequent application of the law of the forum and this in turn has had

[3] E.g. Niboyet, *Cours,* p. 410.
[4] See Borum, p. 31, and Gomard in *U.f.R. 1963 B,* p. 81.
[5] See Rabel I, 2nd ed., p. 100.

most unhappy consequences, in particular a widespread and unanimously deplored "forum shopping". Accordingly, nowhere have the efforts to reach uniformity of result through treaties been greater than in this part of maritime law.

The special considerations leading a country to establish a set of conflict rules of its own for the purpose of ensuring the application of its own substantive rules are believed in most cases to be less important than the need for certainty which is met by uniformity.

It has not, however, been possible for the doctrine to achieve "concerted practices" among the national courts in the conflict of laws concerning contracts. This is largely due to the fact that case law has since 1800 been influenced by authors following different theories, and because of these influences the rules have drifted apart. The uniformity has been hampered also by the "homeward trend" of the courts, by their preference for the law of the forum.

These tendencies appear to be stronger in Germany, England, and France than in the U.S.A.[6] and the Scandinavian countries. This unfortunate process has, of course, prevented uniformity, but it should not be impossible for the courts to change their practice.

The rules which are here suggested for Scandinavian judges are to a large extent of such a character that they may be recommended for application also by courts outside Scandinavia. They have to some extent been framed on the basis of the experience of English, French, German, American, and Scandinavian courts.

The prospects that the efforts of the doctrine will increase uniformity among the courts are not, perhaps, very good. An attempt is nevertheless made here, partly because the rapid growth of international trade in the last decade has made the need for uniformity more urgent than ever before and partly because courts and legislatures are slowly becoming more and more internationally minded in this field of the law. This development is believed to be to some extent due to the fact that so many modern writers

[6] Ehrenzweig finds and supports a basic rule of the *lex fori* for questions concerning the performance of the contract (termination of the contract, voidability, forfeitures, releases, breach of the contract, etc.) see *Contracts*, pp. 1171 ff. This rule may perhaps be established for conflicts between various common-law systems like those between the legal systems of the United States but in Europe much "forum shopping" and arbitrariness would probably follow from such a rule.

in Europe and U.S.A. have urged uniformity and have emphasized the comparative method as the best way of achieving uniform rules.[7]

§ 2. THE HISTORICAL BASIS OF THE PRESENT LAW

I. The Continent

The legal system of antiquity did not develop conflict-of-law rules to any great extent.[8] But two provisions found in the *Digesta* have often been invoked for cases concerning the conflict of laws of contracts and other private transactions. These are D. 21.2.6 "Si fundus"[9] and 44.21.7 "Contraxisse".[1] "Si fundus" laid down that a seller of land should give security for his 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 fulfil 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",[2] 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 already had.[3]

Bartolus a Sassoferrato, the post-glossator (1314–57), asserted, however, that the law of the place of contracting should govern 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 were 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,

[7] See, e.g., the writings of Henri Batiffol, Franz Gamillscheg, Arthur Nussbaum, Ernst Rabel, Martin Wolff, and Hessel E. Yntema.

[8] See Gamillscheg, *Einfluss*, p. 72.

[9] "Si fundus venieret ex consuetudine ejus regionis, in qua negotium est, pro evictione cavere oportet."

[1] "Contraxisse unusquisque in eo loco intellegitur, in quo ut solveret se obligavit."

[2] Batiffol, p. 20.

[3] By von Bar II, p. 12.

expressly or by implication. If not, the law of the forum would govern the effects.[4] According to Bartolus the "natural consequences" were included in the substance of the contract, for instance the demands for due performance.[5] He held that the effects comprised the "irregular consequences", e.g. the consequence of the seller's negligence or delay in performance.[6] This *dépeçage* of the problems of the contracts into two legal systems was also found among later writers.[7] 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 centuries.[8] Contracts, on the whole, did not give rise to many conflict cases. The law of contracts was *jus commune* and was left almost completely untouched by the statutes. The law of matrimonial property was to a greater extent governed by diverging statutes and within this related field of law there were established some of the conflict rules which later achieved a dominant importance in contract law.[9]

The prevailing rule of the law of the place of contracting was first criticized by the French author Charles Dumoulin (1500–66).[1]

In those fields of the law, said Dumoulin, where the will of the parties is the decisive factor it is the circumstances indicating such a will that should decide 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." If, for instance, a man on a journey in Italy sells one of his houses in Tübingen,

[4] Gamillscheg, *Einfluss*, p. 55.

[5] "Aut quaeris de his quae oriuntur secundum ipsius contractus naturam tempore contractus" (see Lainé I, p. 135).

[6] "Aut de his quae oriuntur ex postfacto propter negligentiam aut moram" (see Lainé I, p. 135).

[7] On Burgundus and Boullenois, see Batiffol, p. 24.

[8] See, for instance, Paulus de Castro (15th century), here quoted from Lainé I, p. 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."

[9] See Batiffol, p. 24.

[1] See Gamillscheg, *Einfluss*, p. 27, on Dumoulin's *Commentarius in codicem sacratissimi et consuetudinibus localibus.*

there is, according to the Italian rules, no necessity for him 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 Geneva 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 connecting element and to find the applicable law by an evaluation of the connecting factors of the individual case.

The rules just described were "all", Dumoulin said, "in accordance with tacit and probable intentions of the parties".[2] Because of this passage Dumoulin was called by later writers the father of party autonomy.[3] 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 contract matters when mandatory substantive rules were involved. The intention of the parties was mentioned by Dumoulin in a context where he discussed those parts of the substantive law where the intention and will of the parties prevailed,[4] and all the examples which he used were taken from parts of the law where the rules were "pliable". In the following part of his paper, dealing with "matters not depending on the will of the parties but on the force of the law"[5], party intention was not mentioned as an explanation of the conflict rules which he established.

The place-of-contracting rule 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*

[2] "Jus est in tacita et verisimiliter mente contrahentium", see Lainé I, p. 228.

[3] See, for instance, Weiss, *Manuel*, p. 362, Federspiel, p. 52.

[4] "Aut statutum loquitur de his quae pendent a voluntate partium", see Gamillscheg, *Einfluss*, pp. 32 and 113, and Niboyet, *Recueil*, p. 9, Batiffol, p. 22.

[5] "Aut statutum disponit in his quae non pendent a voluntate partium sed a sola potestate legis."

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 18th century and the beginning of the 19th century the place-of-contracting rule was reaffirmed; the early Continental law reports from the beginning of the 19th century also showed that the *lex loci contractus* was preferred in France, Germany and Scandinavia, and this continued to be the case throughout the first half of the century.

Many authors and many courts based their application of the law of the place of contracting, and—when used in a few cases—the law of the place of performance, upon the presumed intention of the parties.[6] This was done by, for instance, the first Danish writer on the subject, A. S. Ørsted, in an article published in 1822. He referred to several Danish statutory provisions and also invoked the very nature of things, inasmuch as "the parties must be taken to have bound each other with a view to the law prevailing at the place where the contract was made and, as the will of the parties is the basis of their mutual obligations, so the limits of these obligations must be set by their will".[7] Had the parties expressly or tacitly intended another law to govern that law would be applied.[8] Persons domiciled in Denmark, however, could not waive the protection given to them by Danish statutes on illegality and incapacity because these statutes concerned "matters which could not be changed by private agreement".[9] By this statement Ørsted to some extent contradicted his earlier pronouncements on the paramount importance of party intention, and so it remained doubtful how far Ørsted would recognize party autonomy in international contracts.

II. England

Until the latter part of the 18th century the application of foreign law was almost unknown to English courts. In the first English cases in which application of foreign law was discussed the courts proved to be influenced by the Dutch writers of the 17th century,

[6] See, for instance, Boullenois, *Traité de la personalité et de la réalité des lois*, Paris 1766, p. 57.
[7] *Eunomia* IV (1822), p. 8.
[8] *Eunomia* IV, p. 10.
[9] *Eunomia* IV, p. 13.

Huber and Voet, and this influence continued to assert itself in England and spread to the United States. Especially Huber's short treatise "De conflictu legum" was frequently consulted.[1] In contract matters the intention of the parties was, both in Huber and other writers, an important reason for the application of the *lex loci contractus* and for the exceptions which he too established[2] in favour of the *lex loci solutionis*. But Huber and his fellow countrymen also explained their rules by the principle of sovereignty. If the sovereign of the place of contracting had, for example, bound the parties by their contract through his laws it was binding everywhere. 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.

III. The 19th Century

In the 19th century the place of contracting lost its paramount importance both on the Continent and in England. This was partly due to a change in the habits and the techniques of international trade.

Until the beginning of the century the merchants had owned the ships carrying their goods and they themselves or their agents had bought and sold their cargoes in the ports. When from about 1840 international trade increased rapidly, shipping had already become a separate trade; the merchants and their agents were more seldom found on the ships and the sales contracts were not as frequently as before concluded at the place where the goods were loaded and unloaded. From 1850 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 the performance of the contract. Now both

[1] See for the unabridged Latin text: Lorenzen, *Selected Articles*, pp. 162 ff.

[2] "Verum tamen non praecise respeciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus."

these acts were done by each party at different places and at different times.

Party intention took over the role which the place of contracting had had. From 1865 and 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 this new rule, though common in Europe, broke the uniformity created by the place-of-contracting rule. The detailed rules, if any, established as applications of the presumed intention differed from country to country, and in quite a number of cases the intention was found to be the *lex fori*. This *lex fori* tendency or "homeward trend" became very noticeable alike in French, German and English conflict of laws.

§ 3. THE PROBLEM OF UNITARITY

The first of the three main problems mentioned in the introduction was: Should the contract be governed by a unitary law, or should it be divided into several laws? This question will here be answered in the affirmative: There should be a unitary legal system for the contract.

I. The "Dépeçage"

1. As mentioned *supra,* p. 113, a few medieval authors would apply the law of the place of performance to questions concerning breach of the contract; other contractual problems were to be decided by the law of the place of contracting. In France and Germany this theory does not appear to have been adopted, but in the United States a dictum by Justice Hunt in *Scudder* v. *Union National Bank of Chicago*[3] 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 per-

[3] 91 U.S. 406 (1875).

formance ... 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 England[4] 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*.[5]

But 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 of the Conflict of Laws of 1934 the rules of the *Scudder* case became the prevailing law in the United States. It is still so in most American states.

The rules reflect the principle of territoriality which had been introduced into Anglo-American law by the Dutch writers of the 17th century. Every act should be determined according to the laws of the place where it had occurred. Joseph Beale and with him the Restatement of the Conflict of Laws wanted the validity and the effect of promise to be governed by the law of the place of contracting[6] 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 performance.[7] In Beale's writings and in the Restatement an enumeration of those problems which either law should decide was attempted, but it was admitted that the distinction between the creation of an obligation and the performance thereof was difficult and could not be based upon logic. It was a question "of degree governed by the exercise of judgment".[8]

A corresponding trend is found in Swiss case law. During the 19th century the courts adopted party autonomy, but in a case tried in 1906,[9] the Swiss Federal Supreme Court maintained that the law of the place of contracting was to decide problems concerning the formation of the contract, and it seemed that the principle of territoriality had influenced this decision. From that time on, for more than 40 years, the Swiss courts applied the

[4] See *Scott* v. *Pilkington* (1862), 2 B. & S. 11.
[5] 142 U.S. 116 (1891), 35 L. Ed. 956.
[6] Beale I, p. 308, II pp. 1090 ff., III p. 1962, Restatement § 332.
[7] Beale II, pp. 1259 ff., Restatement § 355 ff., especially §§ 358 and 372.
[8] Restatement § 332, comment c.
[9] BGE 32—II 415 (1906), see Moser, p. 20.

law of the place of contracting to questions concerning the formation of the contract and the law (presumably) chosen by the parties to questions concerning its effects.

Scandinavian courts have not practised the *dépeçage* of the contract into two laws in the way the American and Swiss courts have done. Swedish[1] and Norwegian[2] courts seem to reject any form of *dépeçage* in contract matters. A minority of Danish cases have shown a tendency to decide the point at issue according to the law with which it was most closely connected and not according to the law with which the contract as a whole was most closely connected. Thus in three motoring accident cases decided by the Danish Courts of Appeal in the period 1937–53[3] it was held that the law of the place of the accident and not the law of the contract governed the right of the passenger to recover damages from the owner of the vehicle. A conflict rule in tort law was thus applied to what in Scandinavian law would be a contractual issue.

These cases and others showing the same tendency are, however, comparatively few in number. The Danish Supreme Court has both in holdings and dicta shown a preference for a unitary law.[4]

2. The experience of American and Swiss courts seems to encourage the application of a unitary law to most legal questions of the contract.

The *dépeçage* leads to difficulties in separating those questions which belong to one category from those belonging to another. In the *Brantford City* case[5] the Federal Court for the Southern District of New York stated that the distinctions made by Justice Hunt in the *Scudder* case[6] were not applicable to the problem of the validity of a stipulation in a bill of lading exempting the carrier from his liability for the negligence of his crew: "These distinctions are inconclusive here; because while on the one hand,

[1] See especially *Carlstein* v. *Carlstein*, 1930 N.J.A. 692, *Försäkringsaktiebolaget Skandia* v. *Riksgäldskontoret*, 1937 N.J.A. 1.

[2] See especially *Stavanger Sparkasse et al.* v. *The State of Norway*, 1937 N.Rt. 888, and *Ostmart's Rederi* v. *A/S Lorents Nilssen*, 1956 N.Rt. 1172.

[3] *McCull* v. *Bennis et al.*, 1937 U.f.R. 415, *Kjær* v. *Pedersen et al.*, 1940 V.L.T. 324, and *Tove Ipsen et al.* v. *A. J. Thomsen*, 1953 U.f.R. 945.

[4] See especially *Weiss* v. *Nicolajsen*, 1940 U.f.R. 652.

[5] 29 F. 373 (1886).

[6] See *supra*, note 3 at p. 118.

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, in the performance of the contract are 'matters connected with its performance' which would fall under the second branch." In *Swift & Co.* v. *Bankers' Trust Co.*[7] Mr. Justice Lehman 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* rule of the Restatement were perhaps even more frequent and more violent in the American doctrine.[8]

In the latest drafts of Chapter 8 of the Restatement of the Conflict of Laws, Second, the distinction has been dropped. "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 predictability."[9]

The uncertainties inherent in the distinction were pointed out by the Swiss Federal Supreme Court in a decision of 1952 whereby the *dépeçage,* or *coupure générale* as it is also called, was openly disavowed and a unitary law was reintroduced into Swiss case law. The *dépeçage* of the contract should be avoided, the Court said. The distinction between formation, which is governed by one law, and effects which may be governed by another, is often difficult and may remain uncertain until the decision of the court of last instance is rendered, which may endanger the certainty of law. The Swiss court also pointed out that a contract is an entity

[7] 19 N.E. 2nd 992 (1939).

[8] Rabel II, 2nd ed., p. 452, Cook, p. 360, Lorenzen, *Selected Articles,* pp. 261, 316. Ehrenzweig is also critical about the distinction made by the Restatement First, see *Contracts,* pp. 1171 f. He himself seems to rely on two basic rules, the rule of validation governing questions of validity and the rule of the *lex fori* governing questions of performance, see *Contracts,* p. 985. One may question, however, whether this distinction is so very much clearer than that of the Restatement, which Ehrenzweig blames for its lack of clarity.

[9] Restatement Second, p. 5.

from an economic and from a legal point of view and that questions bearing upon its execution, interpretation and discharge should all be governed by one law. To certain rules respecting one of these questions correspond other rules on other questions. A *dépeçage* corrupts this entity.[1]

3. The answer to the question concerning *dépeçage* is dependent upon the general approach to the framing of the conflict of law rules. A system of one fixed rule, like the one followed by the courts of American states which in principle adhere to the place of contracting, will need some flexibility, and this need may be partly satisfied by letting some questions be governed by the law of the place of performance.

A *"result-selective"* or *"pragmatical"* method, such as that favoured by David F. Cavers,[2] will inevitably lead to a *dépeçage*. Not only the contacts of the contract but also the issue decides which law is to be preferred, and it is possible in a case having contacts with two states and two issues that the court will decide that one problem finds its best solution under the substantive law of state A and that the other problem finds its most appropriate answer under the substantive law of state B. A cleavage of the contract into more than two laws is theoretically possible, when several states and several issues are involved.

A method which determines the law only by the contacts of the contracts as a whole, as the *centre-of-gravity method* does, will tend to establish a unitary law. This method prevails in Scandinavian as well as in French and in English case law.[3] The present writer, too, supports this method, and this view, together with the above-mentioned arguments of the Swiss and American judges, leads him to favour the unitary law.

This conclusion, however, does not prevent certain exceptions. These will be dealt with below in section 6.

[1] BGE 78 II 74 (1952): "Or, le système de la coupure générale du contrat doit en effet être abandonné. Il brise d'une manière artificielle l'unité du rapport contractuel et peut susciter de sérieuses difficultés dans les contrats bilateraux, si l'on considère que l'action en exécution ou en dommages-intérêts pour inexécution dépend au premier chef de la conclusion effective d'un contrat valable. D'autre part, la distinction entre ce qui ressortit à la formation et ce qui ressortit aux effets du contrat est souvent délicate et peut demeurer incertaine jusque devant la jurisdiction suprème, ce qui est du nature à compromettre gravement la sécurité du droit..."

[2] See *supra,* note 8 at p. 109.

[3] See *infra,* pp. 153 ff.

II. The "Splitting Up"

1. The splitting up of the contract is an idea that 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, which might lead to the application of two laws in bilateral contracts which contemplate performance of each party's obligation in a different country. Von Savigny was one of the first true universalists of modern times. He wanted every legal relationship to be decided by the same law, whichever of the possible jurisdictions it was brought before. This was demanded by the law of nations and led to 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. The application of the law of the place of performance led to a splitting up of the contract, but this, von Savigny argued, was in accordance with the ideas of Roman Law, where a contract was made by stipulations by which each party contracted his obligation. 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 its own country.[4]

The idea of splitting up was also favoured by von Bar[5] and by later German authors who argued in favour of the application of each party's national law. It was adopted by the courts, which from about 1860[6] applied the law of the place of performance, and so gradually developed a splitting up of bilateral contracts. It was also contended that it was in accordance with the legitimate expectations of each party that his obligations should be governed by his own law. In the first decades of this century and under the influence of German doctrine, especially von Bar, a few Danish, Swedish and Norwegian writers spoke in favour of the application of the law of the domicile of the debtor. In one Danish case, decided by the Commercial and Maritime Court of Copenhagen in 1915,[7] this led to the application of two laws. Apart from another case from 1918,[8] where the same court

[4] von Savigny § 369, p. 202.
[5] von Bar II, p. 15.
[6] See, for instance, OAG Lübeck 26-3-1861, Seuffert 15 no. 183; and OAG Rostock 3-11-1862, Seuffert 19 no. 5.
[7] *Colcombert Fils et Cie.* v. *Brammer,* 1915 U.f.R. 9.
[8] *van Waverens Graanhandel* v. *Th. Just,* 1918 U.f.R. 587.

argued *obiter* for this division of the contract, Scandinavian courts have not divided the bilateral contract so that two laws became applicable. They did not do so even in the period at the beginning of this century when they tended to apply the law of the debtor's residence as a general presumption. The splitting up has been attacked by the Danish jurist O. A. Borum[9] and has not appeared in recent cases.

The real reason behind splitting up the transaction has been the frequent coincidence of the applicable law and the law of the forum. According to German substantive law[1] the debtor generally has to perform at the place of his residence, and according to German law of civil procedure[2] he must generally be sued at the same place. The Scandinavian laws of civil procedure all have the same rule as the German, and the frequent coincidence of the law of the domicile and the law of the forum has been pointed out by the Swedish jurist Almén,[3] who therefore advocates the application of the law of the domicile.

Almén was not, like von Savigny, a universalist. He had seen the German cases in which the splitting up had been practised under the influence of von Savigny. These cases had shown how often the law of the forum was applied. The splitting up was in reality an application of the theory favouring an application of the *lex fori*. This theory of the *lex fori*, he said, could never have survived as it did, openly or disguised, if it had not been basically well justified. Almén's influence on Swedish courts was not, however, significant in this respect.

2. In the opinion of the present writer the splitting up leads to an artificial division of the contract, which is and must be upheld as an entity. 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 his rights. Does, for instance, the rescission by the buyer of a sales contract, on the ground of the breach of a condition, imply an obligation for the seller to take the goods back and to repay the price, if already paid,

[9] Borum, pp. 141 and 143.
[1] BGB §§ 269, 270.
[2] ZPO §§ 12, 13.
[3] Almén, 2nd ed., pp. 50 ff.

Batiffol's theory, he says, is a monistic theory; it applies both in cases where there was a choice of law by the parties and in cases where no such choice was made. In both types of cases the court decides where the contract is located having regard to its contacts. It may be guided by the locational intensions, if any, of the parties, and if such intentions are supported by the contacts, but, if not, the court itself decides where the contract is located.

By this theory Batiffol also claims to solve some difficult questions which puzzle champions of party autonomy. Which law governs the validity of the choice-of-law clause?[8] What will happen when the chosen law makes the contract void?[9] These difficulties arise if the choice-of-law clause is considered to be as binding as other clauses of the contract. If you consider the choice as being only an element of its location and not as part of the contract, the problem as to which law decides the validity of the choice-of-law clause will not arise. Nor will there be any inconsistency in the situation if the chosen law declares the contract to be void. If the contract is located in the country the law of which has been selected, it is void; if not, and if the law of the place to where it really belongs upholds the contract, it is valid.

In his later writings[1] Batiffol emphasized yet another important consequence of his theory:

Only *one* law will govern, and that is the law of the country where the contract is located. Some writers and some courts have allowed the parties to select several laws or to decide that no law shall govern their contract. Parties select several laws when they nominate one law as the proper law and choose another—more liberal—law to govern some special problems regulated in the proper law by mandatory rules undesirable to the parties. No law is selected when the parties refer to the terms of the contract as being its "only law" or when they appoint a law to apply to the contract as it was at a certain time, for instance when the contract was made so that later changes in that law will not affect the contract. To allow such agreements would be to rob the law of its most important prerogative, to rule over the will of the individual. This, Batiffol asserts, should not be allowed.

2. In direct opposition to Batiffol's "objectivist" theory stands the "subjectivist" theory of Gamillscheg.

[8] *Op. cit.* No. 52, p. 46.
[9] *Op. cit.* No. 54, p. 47.
[1] *Mélanges Maury*, pp. 43 ff.

In modern times, Gamillscheg says,[2] 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. Party references are recognized almost everywhere in the world.[3] The logical objections against party autonomy are unfounded: the validity of the choice-of-law clause is derived from the conflict rules of the forum. The fears of many theorists that autonomy will lead to evasion of the law otherwise governing are unfounded. Evasions are almost non-existent in practice.[4] Nor is it a serious argument against autonomy that the law chosen may render the contract invalid; if the parties have chosen such a law they must take the consequences of their mistake. The contract is void. This is the common rule in private law.

Gamillscheg attacks those jurists who, like Batiffol, would pay regard to the choice of law by the parties only if the contract has a local contact with the chosen legal system. A contract is a creation of the human mind and this creation is not to be bound to any fixed locality. Contract law is private law, and has private law any territorial boundaries at all?[5] If local contact with the chosen legal system were made a condition, many choices would be set aside which on their merits deserve consideration. The parties should be allowed to choose a law because it prevails in some types of contracts, as for instance English law in charter-parties and in some contracts for the sale of corn and cattle food; the parties should be allowed to choose a law because both know and have confidence in that law or because it is well suited to their contract. The only requirement Gamillscheg makes with regard to the contacts of the contract is that the latter should be international, that it should have local contact with more than one state or country.

Gamillscheg attacks Batiffol's theory of localization. A German and an Argentine make a corn contract, and subject it to English law, not because they consider it to be an "English transaction", which it is not, but because they want it to be governed by English law. An agency contract between a Dutch principal and a German agent is subjected to Dutch law by the parties not because they

[2] *AcP*, p. 332.
[3] *AcP*, p. 303, *Arbeitsrecht*, p. 113.
[4] *Acp*, pp. 308–12.
[5] *AcP*, p. 312.

find its closest contact to be the Netherlands but because the stronger party imposes his will upon the weaker.[6]

If the parties have not made any choice, the presumed intention will govern.[7] The court must put itself in the parties' place and select the law which they would have intended if they had made a choice. This will not—as some jurists believe—lead to fictions. The courts do not pretend that a choice has been made: they know that it has not. But they try to make up for this by making the choice in the true spirit of the parties. The choice of the court should not rest on objective considerations. A contract has no objective centre of gravity; one can never exclude the interests of the parties in the evaluation of the contacts of the contract, and only these interests ought to carry weight in this evaluation.

By claiming that the intention of the parties always governs, be it express or implied, Gamillscheg also wants a monistic theory to prevail.[8]

Gamillscheg criticizes the modern tendency of the German courts to identify the presumed intention of the parties with objective considerations.[9] Social considerations which do not pay regard to the interests of the parties and which are called "objective" ought to have no influence on the conflict-of-law rules respecting contracts. These conflict rules operate within the orbits of private law. The social considerations are safeguarded by public-law rules which fall outside the scope of the proper law of the contract.[1] This division between private and public law leads Gamillscheg to limit the scope of the proper law of some contracts, for instance labour contracts, to the relatively small area of "purely" private law; all the substantive rules of public concern fall outside the scope of the ordinary conflict rules. They are mainly territorial.[2]

III. Evalution

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

[6] *AcP,* pp. 315 ff.
[7] *AcP,* pp. 318 ff., *Arbeitsrecht,* p. 117.
[8] See, for the present writer's view, *infra,* p. 152.
[9] *AcP,* p. 335.
[1] *AcP,* p. 337, *Arbeitsrecht,* p. 117.
[2] See *Arbeitsrecht,* pp. 187 ff., and *infra,* p. 173.

(1) 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 the 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 owing to the great uncertainty which in so many countries exists as to the conflict rules respecting contracts. There is, however, one point upon which there is almost unanimous agreement between the laws of the countries: The party reference 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 Ernst Rabel says in his *Conflict of Laws,* the choice of law by the parties "obviates the unpredictable findings of unpredictable tribunals and consolidates the contract under one law, while negotiation is in course".[3]

(2) Another consideration is the need of the parties for *freedom.* In many international contracts (sales, transport, agency, etc.) the parties, as Gamillscheg has pointed out,[4] may have several creditable motives for their choice. They may want to use a certain formula (e.g., the L.C.T.A. form in the corn trade) which is internationally known.[5] They may want to submit the contract to the law of the country that dominates the market.[6] 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 party.[7] A certain legal system may be well elaborated and well suited to the contract in question.[8] 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 law.[9]

All these reasons may justify a choice-of-law clause, and even if they are not recognized in inland contracts they must be re-

[3] Rabel II 2nd ed., p. 365.

[4] *Supra,* p. 145.

[5] The same applies to several charterparties and bills of lading.

[6] Some French cases indicate this; see *supra,* note 9 at p. 131.

[7] See, e.g., the *Getreide Import case, supra,* note 8 at p. 129. Ehrenzweig, too, speaks in favour of the adoption of a "neutral law", see *Contracts,* p. 991.

[8] See Reese in 9 *I.C.L.Q.* (1960), p. 531 (536).

[9] See *Vereiniging voor den Effectenhandel te Amsterdam* v. *Finansministeriet,* 1939 U.f.R. 296.

spected in international contracts, where the parties are competitors not only with regard to the goods and services but also with regard to the legal systems they may offer. The French Cour de Cassation, which in other fields of the conflict of laws is not liberal in its application of foreign law, has recognized these considerations in the conflict of laws concerning contracts,[1] and English and German courts seem to have done the same.

The exigencies of logic are fully satisfied by the argument of Haudek[2] that the party reference gets its legal acknowledgment by the conflict rules of the forum. That the law of the forum may be unknown at the time of contracting so that it cannot "operate upon" the agreement of the parties is no valid argument against Haudek. As shown by Alf Ross,[3] among other Danish jurists, no law and no rule of law "operates" upon our acts when we do them. The law does not "operate" until the court applies it in a litigation between the parties. That a certain law "governs" the acts of the parties may only mean that it is probable that the court will apply the law. This vitiates one of the main logical arguments of Batiffol and others among the anti-autonomists, that no law can give effect to the parties' choice of law at the time of contracting. Such a law is not needed.

2. The political argument of the anti-autonomists, however, is not entirely nullified. On the one hand strong reasons of policy, as mentioned above, call for the predictability and freedom which the party reference gives. On the other hand "the sovereign" will not always allow the parties to decide whether or not his law and especially his mandatory rules of law should apply. These conflicting interests must be weighed against each other, and the outcome may not be the same in all contracts.

Today, the law of contracts presents a varied picture. On the one hand, the *dirigisme* of the modern welfare state has had a considerable impact on the law. In Scandinavia, contracts concerning leases of immovables, life insurance, employment, and conditional sales are to a large extent regulated by rules designed to protect the weaker party. On the other hand, in the case of commercial sales, transport, agency, loans, and some insurance con-

[1] See *supra*, note 9 at p. 131.
[2] Haudek, p. 5.
[3] Alf Ross, *Om Ret og Retfærdighed*, § 9, pp. 47 ff., p. 54, and § 20, pp. 120 f..

tracts, the parties enjoy more or less complete freedom in framing the terms.

In determining the centre of gravity, some types of contracts are in most cases easily located; others often have dispersed elements and are difficult to attach to any country solely on their objective contacts. 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.

Finally, some contracts are international in type and character; this applies to many wholesale transactions, marine insurance and reinsurance contracts, transport contracts and commercial credits. These often include uniform formulas, such as the Baltcon Charter Party and the La Plata Grain Contract. Other types of contract are less frequent in international trade.

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 society where there are mandatory rules would demand the application of those rules. This interest is the stronger and the worthier of consideration the more the contract in question is regulated by mandatory requirements, and the more closely it is connected with the country concerned. On the other hand, the interests of international trade demand a certain freedom. This, as mentioned above, applies especially to contracts that are international in type and character. Some of these contracts are often difficult to locate, and here the determination of the proper law by the parties may ensure predictability. A forced application of the mandatory rules in another law to international contracts may hamper the exchange of goods and services. These interests should also be recognized by the conflict rules of the state whose mandatory rules would be disregarded by recognition of such party reference to another law. They should be recognized also when the conflict rules of the forum designate, as governing the contract, a law other than that chosen by the parties. The mandatory rules of the law chosen apply in any event.

It will be seen that the less a contract is restricted by mandatory requirements, the more international it is in type and character, and the more subject to uncertainty in determination of its centre of gravity, the freer should the parties be to determine the proper law of that contract. It is natural that there should

be correspondence between party autonomy in substantive law and in reference to conflict of laws. 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 there was little or no freedom of choice in substantive law.

It may be expected that Scandinavian courts, like the French Cour de Cassation[4] and in accordance with the Hague Convention on the Law Applicable to International Sales of Goods,[5] will allow parties a virtually unrestricted freedom of choice in sales contracts, in many of which, as remarked by the Cour de Cassation,[6] the interests of international trade are involved. Location of these contracts solely by reference to their contacts is often difficult, and the relatively few mandatory rules of the legislation that might otherwise apply must be sacrificed in order to ensure predictability as regards the applicable legal system. The contract, however, must be international; it must have substantial local contact with more than one legal system and if the contact with the chosen legal system is weak or nonexistent the party relying upon the reference should prove to the court that both parties' interest in selecting that law was bona fide and worthy of consideration, for instance by showing that the parties were led to their choice by one of the reasons mentioned above on page 147 (the chosen law dominates the market or is well known to both parties).[7] The stronger, however, is the local contact with the chosen legal system, the less should the court insist on proof of a bona fide interest in the selection of that legal system.

The same freedom which the parties should have in sales contracts should also be given them in international contracts of agency, transport, marine insurance and reinsurance.

On the other hand, it is undesirable that the same amount of freedom which is allowed parties to free contracts should be tolerated in life insurance and in employment contracts with subordinate staff. These contracts are more easily located than sales; they are more restricted by mandatory rules, and the interest in

[4] Cf. cases mentioned *supra,* note 9 at p. 131.

[5] For the English translation of the Convention, see 1 *American Journal of Comparative Law* (1952), pp. 275 ff. The Convention has now been adopted by Italy, Belgium, France, and the Scandinavian countries.

[6] *Supra,* note 9 at p. 131.

[7] Moreover, Ehrenzweig finds that "there is little reason ... for limiting the parties' express choice to a law having a substantial or for that matter any contact with the case", *Contracts,* p. 990.

international freedom of movement is not involved to the same extent. It seems that a close local contact with the intended legal system must be the price paid for allowing the parties to choose the law in question. Thus the parties may select the law of the insured party's domicile, though ordinarily the law of the company's head office applies. In some employment contracts, parties may be allowed to select the law of their common origin or domicile if the contract is made in that country, though ordinarily the law of the place of work should apply. In conditional sales and contracts of leases of immovables and in some labour contracts, it is doubtful whether the parties should be given any freedom of choice at all. In leases, the law of the *situs* of the immovable would perhaps always apply.[8]

By thus restricting party autonomy in life insurance contracts, labour contracts, etc., the scope of the proper law need not be restricted to the narrow area which Gamillscheg[9] allots to it. As will be mentioned below,[1] more rules may come within the scope of the proper law of the contract, if that law is chosen on social considerations (as a result of which the law that is most intimately concerned with the relationship will govern), than if the intention of the parties is made to govern.

It is believed that a distinction between more or less "free"

[8] The American writer Ehrenzweig has asserted that the intention of the parties will generally be disregarded by American courts in adhesion contracts and that it will be upheld in most other contracts. In adhesion contracts the invalidating protective statute of the forum or some other state closely connected with the contract has often been applied instead of the more liberal and validating law chosen by the parties. Moreover, *de sententia ferenda* Ehrenzweig would make a similar distinction between contracts of adhesion and "agreements between equals". See, e.g. *Contracts,* p. 976.

This distinction is in my opinion an oversimplification. For the American cases also seem to show that there has been no ban against the choice of law by the parties in adhesion contracts concerning for instance sales (except conditional sales), reinsurance, loans (except small loans) and agency. And in contracts where the protective statutes of one state have been applied, such as life insurance, conditional sales and employment contracts the party reference to a validating law of another state has been disregarded both in the majority of cases where the parties have used an adhesion contract and in those rarer cases where they seem to have drawn up an "individual" contract, see for instance *Owens* v. *Hagenbeck-Wallace Shows Co.,* (1937) 192 Atl. 158 (R.I.) 192 Atl. 464. The basis of division should then be the type of contract (sales, agency, reinsurance, etc. as against employment, small loans, life insurance, etc.) rather than the contract form (adhesion contracts as against "individual" contracts). If Ehrenzweig's approach were adopted by the courts the "individual" contract might have a renaissance in contract dealings.

[9] See *supra,* p. 146.

[1] *Infra,* pp. 172 ff.

contracts similar to that which is applied in Scandinavia exists in most countries of the Western Hemisphere,[2] and that contracts which in Scandinavia are international in type and character are so in other countries, too. But variations in time and place exist. The agency contract, which formerly was a "free" contract in Germany, was in 1953[3] made to resemble an employment contract and is now less "free". Formerly, employment contracts were not frequent 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 the agency contracts party autonomy should be upheld. This has also been recognized in a decision by the German Bundesgerichtshof of January 30, 1961.[4] On the other hand, party autonomy should not be extensive in employment contracts with subordinate staff. The agents need the freedom, for otherwise the import and the export trade may go through other channels. To give a corresponding freedom to the employees would, however, cause disquiet and confusion on the national labour markets.

3. The theory here propounded is subjective in so far as it considers the intentions of the parties to be the governing principle in the free contracts which still dominate international trade. The law of almost every country supports party autonomy. In the free contracts no contact with the intended legal system should be necessary if the express or tacit intention of the parties is proved to be bona fide and worthy of consideration. French and English case law seem to support this latter view.

Autonomy, however, is not considered to be axiomatic. Basically it is social considerations that allow the parties their choice. Freedom is given to the parties in those contracts where they are believed to be the best judges as to the legal system to which the contract should belong. The present writer does not believe

[2] For French law, see Colin et Capitant II, p. 10 ff. For English law, see Cheshire & Fifoot, 5th ed., pp. 22 f. For German law, see Larenz, *Lehrbuch des Schuldrechts,* Vol. I, pp. 1 f., 57, Vol. II, pp. 133, 156; Enneccerus § 163, p. 1005.

[3] HGB §§ 84–92 (Act of 6th August 1953).

[4] 15 MDR 496 (1961).

that these social considerations allow the parties an unrestricted freedom in all contracts.

An objective method should be followed in contracts that are tainted with *dirigisme*. Here the role of the party intention should be restricted; a choice of law should only be allowed in cases where there is doubt as to the contract's centre of gravity, and in such cases the parties should be obliged to select one of the laws that are closely connected with the transaction. American and German case law both have a tendency to restrict party autonomy in contracts that show traces of *dirigisme*.

The method here propounded is also objective in the sense that it allows only one law, be it chosen or not, to govern the contract. The parties should not be allowed to disregard the mandatory rules of the chosen law and they should not be allowed to select more than one law for their contract. This law should be the legal system governing their transaction and later changes in it will affect the contract. The choice of law subjects the parties to the will of the law which they have chosen and to none other. From this it also follows that it is the agreement and not the will that decides whether a choice has been made. If the parties have agreed upon a law that voids the contract, it will generally be void. Certainty in commerce is better served if the courts follow the agreement and apply the law invalidating the contract than if they try to find out what would have been the parties' inmost thoughts and wishes, had they known that the chosen law would make the contract invalid. Scandinavian,[5] American,[6] German[7] and English[8] cases seem to agree on this.

§ 5. METHODS AND RULES IN THE ABSENCE OF A CHOICE OF LAW

I. Case Law

A. *England, France and Germany*

1. During the 19th century French, German and English law abandoned the former rigid rule of applying the *lex loci contrac-*

[5] *Supra*, p. 138.
[6] *Whitman Co.* v. *Universal Oil Products Co.*, 125 F. Supp. 137 (1954).
[7] OLG Braunschweig 7-2-1908, 18 ZIR 544.
[8] *Royal Exchange Assurance Corp.* v. *Sjöförsäkringsaktiebolaget Vega*, 2 K.B. 384 (1902).

tus.[9] In France and England the presumed intention of the parties became the guiding principle, but according to the Cour de Cassation[1] the parties were often presumed to have intended the law of the place of contracting to govern their contract, and many English dicta[2] were to the same effect. In both countries the law of the place of performance also played an important part, but it can hardly be said that the courts established any rules indicating when to apply the *lex loci contractus,* when to apply the *lex loci solutionis,* and when to follow the rules based on other contacts. In Germany the proper law was found through the use of a hierarchy of three rules. Primarily the courts sought as connecting factor the express or tacit intention of the parties, failing that, their presumed intention, and thirdly, as the last resort in the absence of an ascertainable intention, the place of performance. Whereas in English and French law an intention if not expressed was always presumed, the German courts maintained that in many cases the intention could not be ascertained. Where the presumed intention was relied upon, the German, like the French and English courts, gave practically no rules of presumption. It seemed as if the distinction in German law between those cases in which the presumed intention was relied upon and those in which the courts relied upon the *locus solutionis* was often made arbitrarily, and some cases leave the impression that of the two rules that one was preferred which led to German law being applied.[3] In international sales of goods, however, the *lex loci solutionis* regularly governed, whereas perhaps in other contracts the courts were more apt to rely upon the presumed intention; but in cases where the centre of gravity was clearly and obviously situated in a foreign country the presumed intention led to the application of foreign law.

On the whole the laws of the three European countries showed that neither the *lex loci contractus* principle nor the *lex loci solutionis* principle could be used as fixed rules. A standard was preferred, and in accordance with the ideas of the 19th century the intention-of-the-parties rule was adopted as the standard. In Eng-

[9] See *supra,* p. 117.

[1] E.g. Cass. civ. 17-2-1862, Sirey 1862-1-376; Cass. civ. 5-12-1910, Sirey 1911-1-29.

[2] E.g. *P. & O. Steam Navigation Co.* v. *Shand,* 3 Moo P.C. (NS) 272 (1865); *Jacob, Marcus & Co.* v. *The Crédit Lyonnais,* 12 QBD 589 (1884); *Benaim & Co.* v. *Debono,* A.C. 514 (1924).

[3] Lando, *Kontraktstatuttet,* pp. 89 ff. (91).

land this intention rule enabled the proper law of the contract to clear the hurdle of *stare decisis*. No rules could be based on the intention of the individual parties, and in England, as well as in Germany and France, the intention rule gave the courts freedom from the tyranny of precedents. International contracts which hold such unpredictable combinations of facts and such a surprising variability in their local connections and relationships could not be strait-jacketed into fixed rules.

The disadvantages of the presumed-intention standard were unpredictability and arbitrariness. The courts did not create many rules of presumption and in all three countries it was, as Beale said in his comments on English case law,[4] "remarkable to notice the regularity with which the courts found by various methods that it was the law of England [i.e. the law of the forum] which was intended by the parties". The efforts of legal writers to create predictability did not meet with much success. Dicey tried on the basis of party intention to formulate some rules of presumption concerning the application of the law of the place of contracting and the law of the place of performance, but these rules were not always followed in English case law.

Jurists like Pillet[5] and Niboyet[6] in France and von Bar[7] and Zitelmann[8] in Germany attempted to discredit the presumed intention of the parties, arguing 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. The new rules they propounded instead were, however, not adopted. The presumed intention survived.

2. In very recent years, however, an objectivist tendency may be noticed in France, England and Germany, probably under the influence of Henri Batiffol[9] in France and of G. C. Cheshire[1] and J. H. C. Morris[2] in England. In England there have been dicta

[4] Beale II, p. 1102.

[5] *Principes de droit international privé,* Paris 1903, pp. 429 ff.

[6] La théorie de l'autonomie de la volonté, *Recueil des Cours de l'Académie de Droit International,* 1927 I, p. 1, *Traité de droit international privé,* Tome V, pp. 36 ff.

[7] von Bar II, pp. 4 f.

[8] *Internationales Privatrecht* I–II 1897–1912, especially Vol. II, pp. 373 f.

[9] *Supra,* p. 142.

[1] 6th ed., pp. 213 ff.

[2] The Proper Law of a Contract, A Reply, 3 *I.L.Q.*, pp. 197 ff. (1950); *Cases on Private International Law,* 3rd ed. 1960, pp. 254 ff.

in the 1950's to the effect that it is "the most real connection" and not the presumed intention that determines the proper law of the contract.[3] The Cour de Cassation has recently changed its current formulation of the rule on the proper law of the contract. The proper law is, as before, the law adopted by the parties, if they have made a choice. But in the absence of an express choice of law it is no longer the law presumably chosen by the parties, but the law selected on the basis of "the economy of the agreement and its circumstances".[4]

At the same time the German courts have revealed that to give effect to the presumed intention is tantamount to the determination of the law of the contract by "objective" criteria, which means that heed should be paid to the average interests of parties in situations analogous to the one before the court and to social considerations without regard to their individual interests.[5] The French, the English, and the German formulation all permit other considerations than the intention and the interests of the parties to be taken into account.

This approach may lead to the creation by the courts of some rules of presumption. This measure has been strongly recommended by the German writer Arthur Nussbaum, and, in fact, some recent German cases have established rules. Contracts with banks are *prima facie* governed by the law of the office of the bank.[6] Contracts for carriage of goods by land should *prima facie* be governed by the law of the country in which the carrier conducts his business.[7] Agreements concerning licences should be governed by the law of the place where the licence is being used by the licensee.[8] Commercial agency contracts should be governed by the law of the agent's place of business.[9] In contracts concerning sales of goods, however, a special presumption is not yet estab-

[3] E.g. *Re United Railway of the Havana and Regla Warehouses Ltd.*, (1958) (CA) Ch. 52; *Philipson-Stow* v. *Inland Revenue Com'rs,* (1960) 3 W.L.R. 1008 (H.L.).

[4] Cass. Civ. 6-7-1959, Rev. crit. 1959–708, see also Cass. civ. 24-4-1952, Rev. crit. 1952–502, and Cour d'Appel de Paris 27-1-1955, Rev. crit. 1955–330.

[5] See, e.g., BGH 14-4-1953, 9 BGHZ 221; BGH 30-3-1955, 17 BGHZ 89; BGH 10-1-1958, Der Betrieb 1958, 162. The same trend is found in Swiss law, see, e.g., BGE 78-II 74 (79) (1952).

[6] Reithmann, p. 171 and cases, quoted therein.

[7] BGH 30-5-1959 affirming OLG Düsseldorf 28-11-1956, IPRspr. 1956/57-No. 53.

[8] OLG Düsseldorf 4-8-1961, 7 AWD 295 (1962).

[9] BGH 15-3-1962, 15, Der Betrieb 834 (1962).

lished. The old rules prevail and the law of the place of performance of either party is generally still applied.[1]

3. A new approach is also found in German cases concerning employment contracts and insurance.

(a) The *employment* cases earlier followed the same pattern as the other contract cases. However, since the first world war the employment contract has in Germany been much influenced by what on the European continent is called the public law on labour relationships. In the 1920's the German courts, like other courts in Europe, would let the conflict rules embrace only private and not public law. A court would not enforce public rules of the foreign law of the contract, and it would apply the public law rules of the *forum* to the contract only if applicable by their own wording or by implication.[2] Generally they applied to work carried out within and not to work performed outside the *forum* country. The public-law rules of Germany concerning labour relations were applied to work carried out in Germany, and they also applied to such work when the proper law of the employment contract was a foreign law.

Public law consisted in the first place of rules inflicting penalties for violations of security regulations, etc., and rules directing supervision and, if necessary, public coercion. These rules, by which a public authority was one party to the legal relationship they created, were undoubtedly territorial and they have always remained so ("black rules").

Under public law, however, the courts also included rules, dictated by strong public interest, although both parties to the relationship were private citizens ("grey rules"). To this category belonged statutes limiting the employer's right to give notice to pregnant female workers[3] and to workers injured while on duty,[4] rules giving employees the right to compensation in the event of accidents or illness and rules giving employers the duty to establish works councils.[5] Some statutes, for instance statutes embodying the ordinary rules concerning notice to employees, were sometimes

[1] See BGH 10-1-1958, 3 AWD 249 (1958); BGH 19-10-1960, 1961 NJW 25.
[2] See Gamillscheg, *Arbeitsrecht,* pp. 198 ff.
[3] See Gamillscheg, *op. cit.,* p. 346; Beitzke, p. 226.
[4] See Gamillscheg. *op. cit.,* p. 347 No. 314.
[5] Beitzke, p. 225 (III, 1).

classified as public law[6] and sometimes as private law.[7] The distinction between private law and public law—so important on the European continent—has never been very clear-cut, though in the conflict of laws it led to a completely different treatment of the two sets of rules.

In the long run, however, this rigid system could not hold. At first some German public-law rules were applied by German courts to work temporarily carried out outside Germany. On such work, it was said, the German public law "cast its rays" beyond the boundaries of Germany.[8] In one case tried in 1932 foreign public-law rules were applied to work carried out in a foreign country.[9] In some cases the courts now classified as private law, rules which had previously been classified as public law, thus enabling themselves to apply foreign rules or to disregard the German rules in contracts governed by foreign law.

Since the second world war the impact of policy on labour law has also led to a different treatment in German conflicts law of those substantive rules which have always been termed private-law rules. The tendency is clear, although the approach of the courts varies.

"The law of labour relations", it was said in 1951 by an appellate court for labour relations, "is no longer a matter of private and individual agreement. It is laden with social aspects. The place of performance and the presumed intention must now be disregarded. The law of the place where the work is done must govern for social reasons, and not because the parties were presumed to have intended it. Generally they have had no intentions in this respect."[1]

Later decisions, including those of the German Supreme Court for Labour Relations, do not, however, discard the previous conflicts rules in such outspoken dicta. There is, however, a noticeable change. In most cases the Court asserts that the law of the centre of the relationship must govern in the absence of any express or tacit intention of the parties. Some cases omit the phrase "presumed intention" altogether. Some cases mention "the so-called presumed intention" and then identify it with the choice

[6] RAG 1-3-1933, 17, Bensh. 401; RAG 1-4-1933, 19 A.R.S. 3.
[7] RG 8-1-1929, 1929 JW 1291, LAG Frankfurt 23-12-1935, 26 A.R.S. 62.
[8] RAG 20-2-1929, IPRspr. 1929 No. 42; RAG 23-11-1929, 8 Bensh, p. 295.
[9] RAG 28-5-1932, IPRspr. 1932 No. 4.
[1] LAG Bremen 18-4-1951, IZRspr. 1945–53 No. 179; see also LG Hamburg 24-4-1952, IZRspr. 1945–53 No. 187.

by the court of the law of the seat of the work. From the court's evaluation of the connecting elements it is seen that other social considerations than those reflecting the intention of the parties play a more important part in employment contracts than in many other contracts. The seat is generally the place where the work is being carried out, and it is generally the mandatory rules of that place that operate upon the relationship between employer and employee.[2]

The special treatment of employment contracts in German case law is thus remarkable in two respects:

(1) The "grey" public-law rules have had some extraterritorial applications: German public-law rules are sometimes applied to work carried out outside Germany, if the proper law of the contract is German, and foreign public-law rules have been applied to contracts governed by the law of the foreign place of work.

(2) The proper law of the labour contract has been decided by social considerations to a larger extent than has that of other contracts.

Both trends have resulted in a harmonization of the application of public-law rules and of private-law rules.

(b) In *insurance cases* a tendency towards an equal treatment of private and public law is also noticeable.

The authorities of Eastern Germany have nationalized all insurance business within their territory and these measures have affected both companies having their head offices in Eastern Germany and those having only branches there. The companies and branches thus nationalized have been ordered to make no payments on contracts made before the German capitulation of May 1945. However, the companies which have had their head offices or branches in Western Germany have been sued by the parties insured for payment on insurance contracts made before 1945 at their West German head offices or branches, which are untouched by East German nationalization. The West German courts have found for the plaintiffs if the insurance "belonged" to the West German office.[3] If it belonged to an East German head office or branch the courts found for the defendant company. In deciding to which office the contract belonged, as far as these public laws

[2] See BAG 5-5-1955, NJW 1955–1005; BAG 9-5-1959, NJW 1959–1702; BAG 13-5-1959, NJW 1959–1893; BAG 10-5-1962, A.P. No. 6[1] (Blatt 361); BAG 20-7-1961, A.P. No. 2 zu § 611 BGB.

[3] See Reithmann, p. 73, and cases mentioned therein.

of nationalization are concerned, the courts have looked to the law governing the contract for private-law purposes. If the contract for these private-law purposes was located in Western Germany the insurance was found to be a West German insurance.[4]

Until the early 1950's, in deciding the proper law of an insurance contract for private-law purposes the courts followed the ordinary rules on intention and the place of performance. Recently, however, it has been pointed out that insurance contracts are adhesion contracts, that every contract belongs to a certain portfolio, that this portfolio must form a unity financially and legally and that, consequently, the contract for private-law purposes should be located in the country where the insurance is situated, where it has been calculated, and where the insurances in force are being controlled by public authorities. The Federal Supreme Court has said *obiter* that an insurance has its centre of gravity (seat) at the place of the (branch) office to whose portfolio the insurance belongs, *inter alia* because it is subject to supervision by the authorities of that place.[5] Several cases, like the cases concerning employment contracts, have omitted the reference to the presumed intention. The law of the place of the office of the insurer governs *prima facie* in the absence of an effective choice of law by the parties. They refer to the famous commentary on the German Insurance Contracts Act by Bruck-Möller. Here the seat of the office is made the *prima facie* connecting factor, one reason given for this being the necessity of a common public supervision of all contracts to be paid out of the same funds.[6]

To summarize, it may be said that German courts, under the influence of the German doctrine, tend to treat the public and the private law of insurance along the same lines. The same law should to some extent apply for public- as well as for private-law purposes.

B. *The United States*

1. The experience of the courts of the United States is also a rich field for study. The trends in American case law may perhaps be described as a pattern in which there is one main line and some deviations from this main line.

[4] Berlin 25-10-1954, IZRspr. 1954–57 No. 101 a; see also BGH 11-2-1953, IPRspr. 1952–53 No. 37 and LG Berlin-West 21-6-1954, IZRspr. 1954–57 No. 100, and Reithmann, p. 56.

[5] BGH 24-3-1955, IPRspr. 1954–55 No. 32.

[6] See Bruck-Möller, 8. Aufl. 1953, p. 84 and BGH 24-3-1955, IPRspr. 1954–55 No. 32; OLG Hamburg 3-2-1953, IPRspr. 1952–53 No. 36.

The main line is followed by that majority of cases which under the influence of the English Common Law, the Dutch writers Huber and Voet and such later American authors as James Kent, Joseph Story and Joseph Beale would apply the law of the place of contracting or the law of the place of performance, all following the principle of territoriality. This main line may, however, be divided into two branches: some cases, following Story, apply to the contract as a whole either the law of the place of contracting or the law of the place of performance. Other cases follow the theories of Mr. Justice Hunt in *Scudder* v. *Union National Bank of Chicago*,[7] of Beale, and of the Restatement of the Conflict of Laws, and split the contractual problems into two parts: the formation, the interpretation and the validity of the contract are governed by the law of the place of contracting; the performance of the contract is governed by the law of the place of performance.

In the period before the publication of the Restatement in 1934 the branch first mentioned was followed by the majority of cases. But after that time cases agreeing with the second branch became more numerous. Of about 80 decisions rendered by American courts in the period 1945–54, more than half clearly followed the rules of the Restatement and nearly half of the decisions cite Beale or the Restatement. Among the rest of the cases some clearly follow Story and apply a unitary law. Some of the cases, however, which follow the Restatement are compatible with the theory of Story, too, and some cite him together with the Restatement or with Beale.

Among the minority of cases that do not clearly follow the main line in its two branches there are a few which do not reveal the grounds upon which they are decided. A fourth or a fifth of the cases clearly deviate from the main line and these cases are often those in which real conflict problems arise, i.e. where the conflicting laws differ on the point at issue. The "deviating" cases may perhaps become more numerous in the future, owing to the changes proposed in the draft of the Restatement of the Conflict of Laws, Second,[8] and by the conflict rules of the Uniform Commercial Code.[9]

However, a renewed investigation of approximately 60 cases

[7] 91 U.S. 406 (1875).

[8] Restatement of the Law, Second, Conflict of Laws, Tentative Draft No. 6, Chapter 8, Contracts, April 22, 1960.

[9] Section 1–105.

from the years 1959–62 shows almost the same picture. The rules laid down by Joseph Beale and the Restatement of the Conflict of Laws are followed in about half of the cases and, as it seems, in a majority of the states. Those cases that do not use the expressions of Beale and the Restatement have phrases that are borrowed from Story and Kent. Deviations from the main line are, however, also numerous. These divergencies do not, in general, follow state lines. The State of New York, however, clearly follows the centre-of-gravity method. In a few other states faint attempts in the same direction may be traced.[1] In several states the law seems still to be unsettled.

Among the deviations are listed those cases that pay lip service[2] to the traditional rules, but which in fact follow other principles than the principle of the territoriality of the laws.

(a) The cases concerning usury present a numerous group where the courts, faced with the alternative of applying either the law of the place of contracting or the law of the place of performance, have resorted to whichever of the two laws would uphold the transaction. The presumed intention of the parties to apply the law rendering the transaction valid has sometimes been invoked to mask the glaring contradictions between decisions made by the same court.

This practice has now been confirmed in the 6th Draft of the Restatement of the Conflict of Laws, Second, where it is proposed that the validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permitted by the general usury law of any state with which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the state whose local law governs the validity of the contract under the main rules of the Restatement, Second.[3]

A validating tendency may also be found in cases concerning lack of consideration and the validity of oral agreements. Thus in a recent case, *Kossick* v. *United Fruit Co.*,[4] Mr. Justice Harlan of the Supreme Court of the Unites States said on a question concerning the validity of an oral promise: "Turning to the present

[1] See, e.g., *Johnson* v. *Fenestra Inc.*, 305 F. 2d 179 (1962 Pa.).

[2] This lip service has been noted by several American authors, see, e.g., Ehrenzweig, *Contracts*, pp. 974, 992.

[3] § 334, p. 62; see *Seeman* v. *Philadelphia Warehouse Co.*, 71 L. Ed. 1123 (1927).

[4] 81 S.Ct. 886 (1961).

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 a tort liability . . . by virtue of the authority of the State or Federal Government. This fact in itself creates some presumptions in favour of applying the law tending toward the validation of the alleged contract."[5]

(b) Another group of cases in which lip service has been paid to the traditional rules, but where other considerations have governed, is that involving the numerous insurance cases. In these cases the courts by various methods have found that the place of contracting was the place where the insured party was domiciled.[6] This hidden application of the law of the domicile was made to protect the insured party whenever the mandatory rules in the law of his domicile gave him a better protection against the insurance company than the rules in the law of the residence of the company which the company had often made the place of contracting, relying upon the general rules of the Common Law. This practice has been tolerated by the Supreme Court.[7]

(c) A third—and openly admitted—deviation is the *centre-of-gravity method* which has recently been adopted by the Federal Courts in some cases and the Courts of New York State.[8] The courts search for the country or state having the closest factual relationship to the contract. In doing so they will pay regard to the jurisdiction having the greatest interest in defining the rights and duties of the parties and they may also fulfil the expectations of the parties more adequately than by the traditional method. This method is now followed in Restatement, Second.[9] Here it is proposed that in the absence of an effective choice of law by the parties, the law of the place of contracting and that of the place of performance are applied if these two contacts are in the

[5] Ehrenzweig has 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 says, not be expressed in the reasonings of the courts but it is followed in their actual holdings. 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.

[6] See cases mentioned by Batiffol, pp. 296 and 305, by Carnahan (1958), pp. 200 ff., and by Rabel III, pp. 311 ff.

[7] Beale II, pp. 1053 ff., and Restatement First §§ 314–19; see now Restatement Second § 346 h, p. 108.

[8] *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 (1962).

[9] §§ 332 and 332 b.

same state. If performance is to occur in a state other than that of contracting, or if the place of performance is uncertain, additional factors will be considered in determining the state with which the contract has its most significant relationship and which therefore is the state whose law governs. This general rule is then supported by several presumptions,[1] one for each of the more important types of contract (e.g. sales, insurance, suretyship and rendition of services). Many of these presumptions, however, have not so far as I know been clearly established by American courts, though some of them are compatible with court decisions.

(d) In some cases the courts have followed a method proposed by David F. Cavers,[2] who says that the courts should not only consider the relationships and contacts of the contract as such but also the law which would procure the best practical result for the issue before the court. Cavers's theory has its basis in his study of the cases on usury, and other cases where also the outcome of the case and not only the contact of the contract decided the applicable law.

A substantial number of American cases seem to have followed this method, though they have paid lip service to the classical dogmatic formulas. Some rules and trends may be deduced from the actual holdings in the fact situations of these cases[3] but from most of the holdings of cases it seems very difficult to establish rules of any value for future cases. The number of cases openly following the result-selective method is very modest.[4]

It is incompatible with the system of the Restatement, Second, according to which the relationship of the contract and not the "best" solution of the problem raised is decisive. According to Cavers's theory, rules on the contract as such cannot be established and all the presumptions of Title B (Particular Contracts)[5] under Topic 1 in the 6th Draft of Chapter 8 of the Restatement of the Conflict of Laws, Second, would become more or less useless.

[1] §§ 346 e–346 n.

[2] David F. Cavers, "A Critique of the Choice-of-Law Problem", *47 Harvard Law Review* (1933), 173 ff.

[3] This is what Ehrenzweig has attempted to do, see *Contracts,* pp. 974, 984. See on Ehrenzweig's theories *supra,* § 1 note 6 at p. 112, § 3 note 8 at p. 121, § 4 note 8 at p. 151 and § 5 note 5 at p. 163.

[4] See, *inter alia, Vanston Bondholders Protective Committee* v. *Green,* 329 U.S. 156 (161) (1946) and *Global Commerce Corp.* v. *Clark-Babbitt Industrie,* 239 F. 2d 716 (1956).

[5] Restatement Second, §§ 346 e–346 n.

C. *Scandinavia*

In Scandinavia the rule of the *lex loci contractus* advocated by A. S. Ørsted[6] prevailed in the greater part of the 19th century but was abandoned by the Danish courts in 1883[7] and by the Swedish courts at the beginning of the 20th century.[8] It had, however, never been of predominant importance. In Denmark other contacts, such as the domicile of the debtor and the place of performance, had always carried weight and had been taken into consideration together with the place of contracting; in order to explain the weight attached to these contacts the presumed intention of the parties had sometimes been mentioned.[9]

By the beginning of the 20th century application of the law of the domicile of the debtor became the rule of presumption preferred in most cases in Danish,[1] Norwegian,[2] and perhaps also in Swedish law.[3] This happened under the influence of the Scandinavian and German doctrine. The Swede Almén,[4] the Danes Deuntzer[5] and Federspiel[6] and the Norwegian Gjelsvik[7] 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 in favour of the domicile.[8]

After a period of approximately three decades in which a general presumption that the *lex debitoris* should govern prevailed in some cases, and the law of the centre of gravity of the contract in other cases, the centre-of-gravity approach was finally established as the guiding principle and the general presumption was given up. This happened in all three countries around 1937.

The gold clause bonds issued by the Scandinavian governments

[6] *Supra,* p. 116.
[7] *Mackie* v. *Svitzer,* 1883 U.f.R. 789.
[8] *Vereinigte Schuhmaschinen Gesellschaft* v. *Martinsson and Paulin,* 1912 N.J.A. 231.
[9] Lando, *Kontraktsstatuttet,* pp. 271 ff.
[1] *Strufve* v. *Pahl,* 1899 U.f.R. 370; *Beyer* v. *Beyer,* 1925 U.f.R. 839.
[2] *Foreign Hobbies Inc.* v. *Sagedahl,* 1928 N.Rt. 646; *Deutsche Zentralboden-Credit Anstalt AG* v. *Johnson,* 1934 N.Rt. 152.
[3] *Vereinigte Schuhmaschinen* case, *supra* note 8.
[4] Almén, pp. 50 ff.
[5] Deuntzer, pp. 106 f.
[6] Federspiel, pp. 290 f.
[7] Gjelsvik, pp. 211 ff.
[8] See *supra,* note 7 at p. 155.

in the United States shortly after the first world war furnished the occasion. The facts were very similar in the cases presented in the three countries, and the legal issue—whether the American Joint Resolution of 1933 abrogating gold clauses applied—was exactly the same. The courts also reached the same solution, namely that the Joint Resolution should apply, and that the debtor governments were allowed to pay their debts dollar to dollar without reference to the gold value of the dollar. In Norway, the Supreme Court unanimously agreed to a dictum by Mr. 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 consideration".[9] In the corresponding Swedish case,[1] 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 the decision of 1939 concerning the gold clause bonds. 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 the 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 June 5, 1933, apply to these bonds".[2] Nor was anything said, as in the Swedish and Norwegian cases, as to what would have happened if the parties had made an agreement concerning the applicable law.

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 (see on the presumptions *infra*, III, p. 177).

[9] *Stavanger Sparekasse et al.* v. *State of Norway*, 1937 N.Rt. 888.

[1] *Försäkringsaktiebolaget Skandia* v. *Riksgäldskontoret*, 1937 N.J.A. 1.

[2] *Vereiniging voor den Effectenhandel te Amsterdam* v. *Finansministeriet*, 1939 U.f.R. 296 and also *Søderberg* v. *Københavns Telefon Aktieselskab*, 1935 U.f.R. 82.

II. Evaluation

1. The American cases demonstrate the frailties of a system of *fixed rules*. The cases show that the rule of the place of contracting was abandoned when the centre of gravity of the contract was situated in a state other than the state of contracting and—sometimes—when the result offered by the law of the latter state was undesirable. The experience of the German courts does not encourage a general rule applying the *lex loci solutionis*. The Scandinavian courts have realized that the *lex debitoris* could not even be used as a general rule of presumption.

A more detailed system of fixed rules can hardly be elaborated by the courts. That would require legislation and this, it is submitted, would only be worth while if the legislation was made uniform and was preceded by international conventions, such as the Hague Convention on the Law Applicable to International Sales of Goods.[3]

2. As long as the law is case law the courts are left to choose between the centre-of-gravity method and the still more flexible method advocated by David F. Cavers,[4] a method which is here called the *pragmatic method*.

The pragmatic method has been adopted by the Danish writer Allan Philip,[5] but it is not supported by the present writer. Cavers wants the courts to search not only for the state or country having the closest contact with the transaction before the court and to look for the jurisdiction most intimately concerned with the outcome of the particular litigation but also to give effect to the rule of law which procures the best practical result. It is believed that this last element is apt to make for arbitrariness and unpredictability.

It must be admitted that the result-selective or pragmatic method is used in America to uphold the contract in cases of usury, lack of consideration and validity of oral promises, and in cases concerning workmen's compensation and in (some) insurance cases to give the weaker party the best protection offered by the conflicting statutes.[6] When the outcome of such a selection is

[3] *Infra*, p. 179.
[4] *Supra*, p. 109.
[5] *Studier i den internationale selskabsrets teori* (Studies in the Theory of International Company Law), Copenhagen 1961, pp. 7 ff.
[6] *Supra*, pp. 160 ff.

known to the parties when making the contract this will not create any great uncertainty, and in the cases where a liberal policy is pursued (usury cases, etc.) this outcome will generally be noticeable at the time of making the contract. When the outcome of a selection is not and cannot be known beforehand, as in some of the workmen's compensation cases, the selection will often seem awkward and based on the hazards of life rather than on justice and equality before the law. An employee from state A who is ordered temporarily to do work in state B and who suffers injury in B will be entitled to the better protection provided by the legislation of B as compared with that of A, although normally he is employed in A, where both he and his employer reside. His fellow employee, working for the same employer, suffering the same injury in state A will obviously not benefit from this "stroke of good luck". The result-selective method entitles the courts to give the international or interstate cases a freer and "better" treatment than the purely internal cases; allowing themselves this method the courts would operate as politicians and social engineers to a much larger extent than when, in deciding internal contracts, they are limited to the "unsatisfactory" outcome of one local law.

In the opinion of the present writer, the few result-selective conflict rules framed by American courts in interstate relationships do not prove the usefulness of the method in general. In the states some predictability is ensured by the practices of the federal courts. The U.S. Supreme Court may formulate and has to some extent formulated the guiding principles. In international relationships like those encountered by European courts the method can hardly be adopted with success. There is no Federal Supreme Court of Europe, and so the evaluation of what is the best practical result may differ from court to court and from state to state. When the European courts have allowed themselves to be guided by their preference for some special substantive rule of law they have nearly always found this rule in the law of the forum. To formulate new and universally recognized conflict rules on this basis of selection seems almost impossible in Europe. Moreover, in the United States the number of result-selective rules is very scarce. It is noteworthy, for example, that the Restatement, Second, adopts little of Cavers's method.

3. The present writer believes that preference should be given to the *centre-of-gravity method* and that this method should be sup-

ported by presumptions relying almost exclusively on the contacts of the contract. This also seems to be the view of Borum,[7] Nial[8] and other modern Scandinavian writers.[9]

Only this method can fit cases in which the parties have expressly or tacitly manifested their intention and cases where no such intention is to be found into a common pattern without radical inconsistencies in approach and solution. The English and German systems have taken this into consideration; the centre-of-gravity method approximates the systems of these two countries which are neighbours and important trade partners of the Scandinavian countries. This also is an argument in favour of the preservation of this method.

Nevertheless, the uncertainty that this centre-of-gravity method may occasion is a grave objection. How well this doctrine works must therefore depend upon various factors, especially on the possibility of establishing rules of presumption. Scandinavian law, it is believed, has not yet reached a stage of sufficient predictability. However, it should be taken into account that the number of reported cases is relatively small. But this alone does not explain the uncertainty. The main reason is that Danish and Swedish and to a lesser degree Norwegian courts hesitate to lay down rules; their decisions are somewhat casuistic.[9a] When Scandinavian courts assume that no reliance has been placed upon previous decisions, they generally do not feel bound by them. And when no rules are stated, the courts may well assume that no expectations have been engendered concerning future lines of decision. This renders somewhat uncertain any predictions based upon rules inferred from grounds of decision in which no rules are declared. But even where presumptions have been stated on which expectations may be assumed to have been based Scandinavian

[7] Borum, p. 148.
[8] Nial, p. 37.
[9] E.g. Karlgren, p. 100, though in his case with some hesitation.
[9a] Whereas 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 rules of law are often omitted by Danish and Swedish) courts. From early times, they seem only to mention those facts that are 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 which contact decisive *prima facie*, i.e. which rule was applied. Norwegian courts are somewhat more inclined than are the Danish and Swedish courts to cite the rules of law.

courts, having no doctrine of *stare decisis,* are somewhat freer to change the rules than are Anglo-American courts.[1]

To this it must be added that, in any system which operates without fixed rules, the courts will sometimes be tempted to find reasons for applying the *lex fori.* The greater the uncertainty the greater is the danger of arbitrariness.

However, if more rules of presumption were to be established and given some measure of fixity the dangers of unpredictability and arbitrariness would be perceptibly reduced. Such a development would be possible in Scandinavia without breaking radically with the prevailing theories and methods.[2]

4. In trying the gold clause case the Swedish court described its method as a centre-of-gravity method based on the *objective* elements of contract. This suggests a refusal to base the decision on presumed intention, as the courts of England and Germany had done. One may wonder what is the meaning of the words subjective and objective in this connection and whether the Scandinavian courts should rely on objective data only.

In accordance with the traditional Scandinavian terminology, any evaluation of intentions and interests that are peculiar to the parties in the concrete case before the court would be termed subjective. On the other hand, objective considerations do not derive from the interests or wills 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 the one before the court, and, in addition, the limitation of individual interests by society, giving weight only to justifiable interests of both parties, and to other social considerations without regard to their interests.

The terms subjective and objective have, as mentioned *supra,* p. 109, not been used in this sense in the present paper. The subjective method here denotes the search for the intention of the parties, be it express, tacit or presumed; the intention includes the concrete interests of the parties in the given case and

[1] See von Eyben in 5 *American Journal of Comparative Law* (1956), p. 114.

[2] A centre-of-gravity method based on rules of presumption for the various forms of contract is not as Ehrenzweig asserts, "an admission of defeat" which "states a conclusion and offers little in the way of guidance..." (*Contracts,* p. 985), nor "an attempt to give a semblance of meaning to chaos" (*op. cit.,* p. 974).

the average interests of a multitude of parties in cases of a similar kind. The reverse of the subjective method is the method which gives preference to social considerations that take no account of the interests of the parties; this is here called the objective method.

5. In contracts where autonomy prevails, the search for a *presumed intention,* for the common interests of the parties, provides useful guidance for the court. It is a natural correlative to autonomy in the conflict of laws. In the vast borderline area between tacit party reference and the total absence of any intention, the subjective method has its field of application. As has been pointed out by Martin Wolff,[3] it has a pedagogical value in encouraging the court to try to put itself in the place of the parties; it does not encourage a mechanical reckoning up of elements of contact pointing in different directions but rather a scrupulous evaluation of such elements.

This subjective approach has been followed by Scandinavian courts. In the gold clause cases, for example, it was pointed out that the parties had prepared the bonds for the American market as American bonds.[4] In the *Högstadius* case[5] the Swedish court applied Swedish law to an employment agreement under which a Swedish masseur had worked in the Transvaal in the Union of South Africa for a Swedish employer; the grounds included the consideration that had the parties known that a covenant in the employment contract in restraint of trade, valid by Swedish law, was invalid under the laws of the Transvaal they would not have made the contract if Swedish law had not been made applicable by a party reference.

In many cases the individual interests or the common interests of the parties to the contract at the time of its conclusion are not ascertainable. Intentions and interests can then be ascertained by estimates of the general attitude of a majority of persons in an analogous situation. This mode of reasoning is found in numerous decisions.

In some cases, however, the decision cannot be based on the interests or intentions of the parties. It will be so uncertain what they would have decided if they had given thought to the law applicable that the subjective method gives no guidance. One can-

[3] *Das internationale Privatrecht Deutschlands,* 3. Aufl., p. 143.
[4] *Supra,* pp. 139 f., 165 f.
[5] *Supra,* p. 140.

not tell, for instance, whether the average interests of the parties to a sales contract would lead to the application of 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 upon the interests of society. It will be mentioned below that these interests are believed to favour the application of the law of the domicile of the seller.[6]

In contracts tainted with *dirigisme,* the interests of society will be an even 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 society 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, particularly if this involves a considerable length of time, and this public concern must have priority over the individual interests.

Taking the social considerations into account will lead to a localization of the contract in the country most intimately concerned with the contract. In the case of many contracts, that country may be determined by one or more connecting elements. In an employment contract this connecting element is generally the place where the work is being carried out, in a lease of an immovable it is the location of the immovable, and in a conditional sale it is the place to which the buyer conveys and in which he utilizes the goods.

6. This approach will help to overcome the unhappy consequences of the hitherto so important distinction between *public* and *private* law. As will be remembered[7] the conflict rules of the Continental countries did not refer to public-law rules. In various respects these rules were territorial: the courts never applied foreign public law; they applied the public law of the forum to all goods, acts and persons within the territory of the state and—generally—not to those outside its boundaries.

The distinction between private and public law is, however, everywhere most inexact. There is some agreement: rules inflicting public sanctions and directing public supervision belong to the public law. This brings criminal law and a large part of ad-

[6] *Infra,* p. 177.
[7] *Supra,* p. 157.

ministrative law under public law. Within labour law and the law of insurance, there are, however, as mentioned above, a great many rules lying in a "grey" and uncertain zone between the "white" private law and the "black" 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 more or less rules of public policy. This has in most cases led to a classification of them as public-law rules. Especially the fact that in labour and insurance contracts the parties were free to choose the applicable law induced the German and French courts to classify the said rules as public-law rules, it being clearly seen that party intention could have no paramount significance in this area.[8] Also in accordance with the traditional liberalistic and national-egoistic ideas of the Continental judges it was believed that foreign-law rules of this character should not be applied. Only the purely private interests inherent in foreign contracts could be safeguarded by the application of foreign law.

The more *dirigisme* spread into the contract law of insurance, labour relationships, etc., the smaller, relatively, became the private-law area of these contracts, and the wider became the cleavage between a private statute governed by the proper law of the contract primarily designated by the intentions of the parties and a public statute primarily designated by the principles of territoriality. Thus in many cases a labour contract was governed by two laws, the public law of the forum and the private law of a foreign country.

As has been seen, the German courts have attempted to a moderate extent, and in some cases subconsciously, to modify this division.

In his book on the conflict-of-law rules respecting labour relations Gamillscheg does not completely deny public-law rules any extraterritorial effect. The public law of the forum, he says, is generally applied only to the work carried out within the forum country; however, some exceptions to this rule should be made, for example in cases where the labour contract is governed by the private law of the forum but the work is carried out temporarily in another country and in some cases where the work is carried out permanently in a foreign country the labour law of which

[8] *Supra*, p. 157.

is not yet developed. Here some of the public-law rules of the forum apply; it is not every public-law rule of the forum that governs, but only those rules having a "private core", which means those rules that regulate the relationship between employer and employee. Among those rules Gamillscheg includes rules protecting mothers and pregnant women against dismissal, rules on minimum wages, and rules on paid holidays—in short, rules dictated by public policy. Foreign public law is generally not applied. If, however, the proper law of the employment contract is also the law of the place of work some foreign public-law rules will apply, especially those having a "private core". In some cases these foreign rules may apply to work carried out permanently in a foreign country even though its proper law is the law of the forum.[9] Thus Gamillscheg recognizes three kinds of rules. *Pure public law* is strictly territorial. *Public-law rules having a "private core"* are to a limited extent given extraterritorial application. *Private-law rules* follow the normal pattern of the conflict rules; they are found in the proper law of the employment contract.

In the opinion of the present writer this theory has two weaknesses:

(1) Gamillscheg would let party intention prevail as to the choice of law of a contract the substantive rules of which are not governed by the principle of autonomy. The consequence is that he must classify a great many rules of labour law as public-law rules in order to make them territorial, and by so doing he makes the scope of the proper law of the labour contract extremely narrow.

(2) Gamillscheg would not, however, deny all public-law rules extraterritorial effect. Some have a limited extraterritorial application. Their application, however, is not directed by the intention of the parties as is that of the private-law rules. Some other public-law rules again are exclusively territorial. This division of the substantive rules respecting labour contracts into three categories makes the whole system complicated.

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

(1) The traditional approach following the blurred distinction between public and private law should be given up and replaced by a mere functional approach in order that the scope of the

[9] See *Arbeitsrecht*, pp. 187 ff.

proper law may be so extended as to admit a substantial part of the "grey" public-law rules.

(2) The influence of the party intention of these contracts largely governed by "grey" rules should be diminished. This is the price which must be paid for widening the scope of the proper law in order to admit some of the public policy rules. It is then not primarily the private interests of the parties but the public interests of the countries concerned with the contract which will decide which law to apply.

7. The American case law and doctrine can help the European courts to arrive at a new and better distinction between "territorial" and "extraterritorial" law rules.

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. Recently this practice has been criticized and the criticism has to some extent influenced at least the American courts. The American Statutes of Limitation and Statutes of Fraud are no longer always classified as rules of procedure.[1] As a new and better criterion for deciding whether a rule is "substantive" Walter Wheeler Cook has 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?"[2]

The same criterion seems also to have been applied when deciding upon the applicability of foreign workmen's compensation statutes. The practical possibility of applying the foreign 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 narrow that it seemed difficult for a foreign court to participate in this team work, the application of the foreign law was refused. If, on the other hand, the rules were applicable by a foreign court without great practical difficulty, these rules were applied.[3]

[1] See Cook, pp. 154 ff., and *The Harrisburg*, 119 U.S. 199, 30 L. Ed. 358 (1886).

[2] Cook, p. 166.

[3] See Harper, Taintor, Carnahan & Brown, *Conflict of Laws*, 1950, p. 476.

The same test should apply on the Continent to those public-law rules which are not pure and "black" public-law rules, or rules dictated by reasons of strong national egoism or, like rules of retorsion and retaliation, made to the prejudice of foreign countries. Such rules, however, are rare in the intercourse between the Western nations and one can only hope that those which exist in the intercourse between Eastern and Western Europe will eventually disappear. But for the bulk of the "grey" public rules the test should be: To what extent can these rules be applied by a court outside the enacting country without unduly hindering and inconveniencing that court? Many of the "grey" rules on employment mentioned above would be applicable; so would statutes fixing the rent in leases of immovables, etc.

The inclusion of so many rules of fundamental policy under the proper law of the contract must, however, lead to a more objective method. It must then be the state most intimately concerned with the contract whose law would primarily govern. The interests of the parties, express, tacit or presumed, would as mentioned above play a minor part in the selection of the law of the contract.

Recognition of party reference in cases where it is express or tacit, and application of the grouping of contacts theory in other cases, will work harmoniously together only if the subjective and the local elements are taken into consideration in both types of cases. Contracts where autonomy prevails in substantive law and where autonomy prevails in conflict of laws should not be subject to demands of local contact with the intended legal system. This also is a field for the subjective approach in the absence of any party reference. The existence through generations in England and Germany of the presumed-intention theory, supplementing reference to express or tacit intention, attests the survival value of the subjective method. Where *dirigisme* has restricted contractual freedom in substantive law, the choice of law should operate in a narrower field among those legal systems with which there is close local contact, and in some contracts, such as leases of immovables, there will hardly be any choice in the conflict of laws. Here also the local contacts, as determined by the social aim of the substantive rules, should predominate in localizing the contract.

The present writer, unlike Batiffol and Gamillscheg, cannot advocate a monistic theory.[4] The objectivist theory of Batiffol is

[4] *Infra*, p. 142 and p. 144.

useful in contracts tainted with *dirigisme* and in those situations among the "free" contracts where no intention is ascertainable. Here social considerations will determine the contract's centre of gravity and this will depend upon contacts which are only partly left to the free determination of the parties. The subjectivist theory of Gamillscheg is useful in the free and international contracts where party intention is ascertainable. As experience shows, no country will serve its true interests by refusing or restricting party autonomy in such contracts.

III. Presumptions

The centre-of-gravity method should, as mentioned above, not involve a complete absence of rules. Rules should exist as presumptions or *prima facie* rules that apply unless special circumstances indicate an exception.

The rules set out below are the rules suggested by the present writer. It will be noted, however, that to some extent they also agree with Scandinavian case law.

A. *The Contacts of the Parties*

1. There is in many bilateral contracts a sound basis for the application of the law of the *place of business* of that party whose performance is the one that characterizes the type of contract in question. Whenever a person "sells" for a monetary consideration a movable, a right, the use of a thing or a right, the cover for a risk, a completed job, or some other object that characterizes the contract as a sale, a lease of a movable, an insurance contract, a contract for labour and work, it is generally "the seller" who calculates the price, and his advantage in being able to predict the applicable law in all his contracts is presumably advantageous to society. The "seller" is also in most of his activities subject to the measures of control and the interferences of the country where he has his place of business.

The basis of applying the "seller's" law would then be that mass bargaining, like mass production, brings down the cost and the prices. The enterprise must calculate expenditures and risks on the basis of a multitude of contracts, and this calculation can be made safely only if all his contracts are governed by the same

law, i.e., the law of the "seat" of the enterprise. German case law seems to be bringing an ever-increasing number of contracts under this rule[5] and the same trend is found in Switzerland.[6] American companies have tried to achieve the same result by inserting in their contracts a clause to the effect that the contract is not final until it has been signed by some official at the head office of the company. By thus making the head office the place of contracting, they have tried to make the law of that place applicable to all their contracts.

In Scandinavia, where the rule has not been explicitly stated by the courts it seems to have applied only to contracts concluded as "contrats d'adhésion";[7] see on these contracts p. 183, below.

But the rule deserves a broader application. The law of the place of the business domicile of the "seller" should apply *prima facie* to the following contracts: sales of goods (with the exception of conditional sales and sales of machinery, etc. to be installed), insurance (except reinsurance), agency contracts and other contracts for services, and finally hire of movables (e.g. automobiles). Where these contracts are made with companies the business domicile is the place where the company's principal administration is being carried on.

2. If, however, the contract has been made with an *agency or branch,* such agency or branch will often calculate and conclude the contract more or less independently of the head office and it will be subject to the measures of control prevailing at its place. Consequently it seems desirable that the law of that place should govern the contract. This is supported by a Danish Supreme Court decision.[8]

The Danish courts have laid down that a contract between parties who at the time of contracting are both present in a country where one is domiciled is governed by the law of the country where it is made.[9] This rule supports the general ex-

[5] *Supra,* p. 156.

[6] BGE 77-II-278 (1951) (sales); 61-II-242 (1935), 60-II-294 (1934), 59-II-397 (1933) (loan); 67-II-181 (1941) (agency), and Vischer, p. 112.

[7] *Livs- og Genforsikringsselskabet Dana* v. *Estate of F. C. Saugman deceased,* 1926 U.f.R. 23, *Coward's Heirs* v. *Försäkringsaktiebolaget Skandia,* 1926 N.Rt. 35.

[8] *Livsforsikringsaktieselskabet "Hafnia"* v. *Carstensen,* 1928 U.f.R. 1045.

[9] *Lübecker Oelmühle* v. *Korn og Foderstofkompagniet Odense,* 1918 U.f.R. 250, *Baltische Fracht Kontor GmbH.* v. *Bentzen,* 1939 U.f.R. 595, *Giesche GmbH* v. *Bentzen,* 1940 U.f.R. 1082.

pectations of the party who is at home 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 the alien coming to the other party, like Mahomet to the mountain, must be taken to have submitted to the laws of the mountain.

The Hague Convention on the Law Applicable to International Sales of Goods is basically in accordance with the rules now stated.[1]

3. In the cases and in the literature on the subject the argument is often advanced that *the law of the domicile of the debtor* should always be applied, since a party generally assumes that his obligations should be governed by his own law. This assumption has, however, no general validity and is inapplicable in bilateral contracts where the two debtors have different domiciles, but a presumption in favour of the law of the domicile in unilateral contracts, as in the case of gifts and donations, may perhaps be established. Several Danish cases have furthermore applied the law of the domicile of the debtor to a non-commercial instrument of debt.[2] The obligations of a surety have been governed by the law of his domicile.[3]

B. *The Contacts of the Subject Matter of the Contract*

1. By the laws of many countries, including those of Scandinavia, contracts concerning *immovables* are governed by the law of the *situs* of the immovable.[4] This rule is supported by an old tradition. It is practicable because questions relating to immovables are governed by the *lex rei sitae*. In dealings concerning immovables, property and contractual aspects are so intimately connected that if different laws were applicable to the two aspects this would lead to difficult distinctions and to inharmonious results.

[1] See Article 3.

[2] *Beyer* v. *Beyer*, 1925 U.f.R. 832; *Franz Bergman* v. *Bock*, 1936 U.f.R. 186.

[3] *Fricke* v. *Salomon*, 1899 U.f.R. 836; *Olsson* v. *Johnsson*, 1885 U.f.R. 545; *Deutsche Vereinigte Schuhmaschinen A/G* v. *Martinsson and Paulin*, 1912 N.J.A. 231, *Marnen* v. *Marnen*, 1926 N.Rt. 725.

[4] Denmark: *Hartvigson* v. *Carstensen*, 1894 U.f.R. 4, *Jacobsen* v. *Sørensen*, 1943 V.L.T. 162. Norway: *Aas* v. *Hermansen*, 1924 N.Rt. 1181; *Deutsche Central Boden Credit A/G* v. *Johnson*, 1934 N.Rt. 152; *Västgöta Dals Bostads Kreditförening* v. *Lund*, 1936 N.Rt. 777. See also Restatement Second § 346 e.

2. In a *conditional sale* reasons of public policy should also lead to the application of the law of the place to which the buyer conveys and in which he utilizes the goods. Here, also, contract aspects and property aspects governed by the *lex rei sitae* are very closely linked together. The rule should apply even when the movable is being sold in a mercantile transaction (e.g. from a manufacturer of textile machines to a manufacturer of textiles), as in some laws, for instance Danish law, the protecting statute also applies to buyers who are industrialists. In these cases a party reference to the law of the seller or to another law will generally be permissible only as an incorporation (for a definition of this concept, see p. 108, *supra*). The proper law of the contract is the law of the actual *situs* of the movable but, in so far as the mandatory rules of that law permit, the parties may select another law to govern their mutual relationship. The rule here propounded is supported by a German[5] and an American case[6] but—so far—not in reported Scandinavian cases.[7]

3. In contracts for *carriage of goods and passengers* by sea and in articles with seamen application of the law of the flag should be the *prima facie* rule. The Scandinavian[8] as well as the English[9] courts seem to have followed this rule of presumption.

Parties may choose the applicable law; however, there are indications in the Scandinavian Bill of Lading Acts that the minimum liability embodied in the Hague Rules which these acts have incorporated may not be derogated from in favour of the shipowner in those transports where these acts apply, i.e. transports from the enacting country and transports to the enacting country from a country that is a party to the Hague Convention.

[5] RG 28-3-1931, IPRspr. 1931 No. 7.

[6] *General Motors Acceptance Corporation* v. *Crawford,* 31 N.E. 2d 689 (Ohio 1939).

[7] See Report from the Swedish "Justitieombudsman" 1963, pp. 128 ff., here cited from Bernhard Gomard in 1963 *U.f.R. B,* p. 85.

[8] Denmark: *A/S Nielsen & Co.* v. *Halkier,* 1909 U.f.R. 133; *Peschardts Træimport* v. *A. O. Andersen & Co,* 1920 U.f.R. 754; *A/S Ceres* v. *The Alexander Shipping Co.,* 1927 U.f.R. 516; *Owners of S/S Flottbek* v. *A/S Kulimporten "Dania",* 1940 U.f.R. 611. Norway: *Svendsen & Son* v. *A/S Ganger Rolf,* 1921 N.Rt. 313; *Stockholms Rederi A/B Standard* v. *A. F. Borch & Sons Ltd.,* 1928 N.Rt. 1098. Sweden: *A/B Arafart* v. *Stenkols A/B Lundvall & Co.,* 1939 N.J.A. 247.

[9] Dicey, 7th ed., Rule 159, and cases cited.

In transports where these acts do not apply, for instance transports between countries outside Scandinavia, the minimum liability of the Hague Rules or similar mandatory rules should also be applied by Scandinavian courts if the port of dispatch has such rules and these rules by their wording or by implication apply to the shipment.[1] In such a case, a choice-of-law clause selecting a legal system permitting exemptions from liability and coupled with an exemption clause will not be respected. In the Danish case of 1920 mentioned above,[2] the court denounced and disregarded references in the Bill of Lading to rules permitting a more restricted liability to be applied by the courts of any other country before which the action might be brought. This reference, seeking to set aside the liability rules of the Harter Act, was not accepted. This seems to be in accordance with American but—seemingly—not with English law.[3] This restriction of party autonomy may seem contradictory to the principles stated above at pp. 148 ff. It might be thought that in maritime transport, an international contract *par excellence,* the interests of international trade would claim greater freedom. The conclusion of a convention between numerous states, however, indicates that in maritime transport the common interests of these states in having some mandatory requirements concerning the carrier's liability have overridden the regard for extensive freedom of contract even in these international relations.

C. *The Contacts of the Contractual Acts*

1. In Scandinavia, the *law of the place of contracting* plays no part in contracts made by persons who reside in different countries. This seems to me to be justified. It is not possible to determine a place of contracting without giving priority to one single element in the making of the contract over other elements. If, as in England and the United States, the place where the agreement became final is the place of contracting, this in Scandinavia[4] would be the place where the acceptance reaches the

[1] See *Owners of S/S Flottbek* v. *Kulimporten "Dania"*, 1940 U.f.R. 611, and also *The Torni* (1932), P. 27, P. 78 CA.

[2] *Peschardts Transport* v. *A. O. Andersen & Co.*, 1920 U.f.R. 754; see *supra*, p. 141.

[3] See *Vita Food Products Inc.* v. *Unus Shipping Co.*, (1939) A.C. 277 (PC).

[4] Aftaleloven (Scandinavian Uniform Contracts Act), Chapter 1.

offeror. But this element has no justifiable priority over other equally necessary conditions for the conclusion of an agreement.

Greater weight should be attributed to the *locus contractus* in contracts made at fairs, markets and auctions. These contracts should be governed by the law of the place where the market is situated. The rule presumably dates from a time when the greater part of international trade took part *inter præsentes* at fairs and markets. It is still supported by the advantage of having one law apply to contracts made at places where dealing is rapid, where individuals as such play no part, and where their personal law may be unknown to their contracting partners. Danish courts[5] have applied the rule to commodity and stock exchange transactions. According to the Hague Convention on the Law Applicable to International Sales of Goods contracts made at exchange fairs and auctions are governed by the *lex loci contractus*.

The place of contracting also plays an important role if the parties at the time of making the contract are present at the domicile of one of them (see on this presumption *supra*, p. 178).

2. The law of the *place of performance* is often applied by American and European courts. It is, as von Savigny[6] and later Batiffol[7] have said, at the place of performance that many contracts "appear to the outer world". When performing a contract in a country the party often has to obey the law there prevailing and for these reasons the centre of gravity of some contracts is the place of performance.

In some contracts, however, this place in its technical legal sense is less significant because it is not the place where the contract is really being performed. In sales contracts the place of surrender is often the place where the risk passes but not the place where the seller really manufactures, collects, packs and dispatches the goods.[8] And there is in some contracts a disagreement between the laws as to where the place of performance is. Monetary obligations are to be performed at the place of the creditor's domicile in Scandinavian law, but at the place of the

[5] *Stamm & Co.* v. *A/S Dansk Amerikansk Handelsskab*, 1916 U.f.R. 588; *Bondy* v. *Poulsen*, 1917 U.f.R. 429; see also Restatement Second § 346 m.

[6] See *supra*, p. 123.

[7] Batiffol No. 86, p. 78.

[8] See Rabel III, pp. 59 ff. (p. 66).

debtor's domicile in German law.[9] In some contracts the place of performance is dispersed over several countries or is unknown at the time of contracting. For these reasons the law of the "seller's" domicile is thought preferable in many contracts.

These drawbacks, however, do not exist in contracts between employer and employee. In these contracts the place of performance is clearly the place of work and is of paramount importance, especially in labour contracts with subordinate employees.[1] In these cases considerations of public policy call for the application of the law of the place of work. But the place of performance should also be the decisive connecting factor in other contracts for the rendering of services less tainted with *dirigisme,* such as employment contracts with executive staff, agreements with independent contractors, and those sales contracts where the seller has to install the goods in an immovable property.[2]

3. The same reasons lead to the application of the law of the *place of exploitation* in contracts by which licences are bought and in publishers' contracts where the rights are given for a certain country or for a part of a certain country.[3] If the licensee is going to use the licence for more than one country then the law of his business domicile should govern.

D. *Subjective Contacts*

1. Standard contracts entered into with enterprises on uniform conditions upon which the individual party is allowed little or no influence (*adhesion contracts*), are governed by the law of the business domicile of the enterprise.[4] This rule applies to insurance contracts, contracts with banks and finance houses, with telephone and telegraph companies, and the like. The rule is almost identical with the rule on the application of the law of the "seller",

[9] Gældsbrevsloven (Scandinavian Uniform Negotiable Instruments Act) § 3 sec. 1, German BGB §§ 269, 270.

[1] Denmark: *Merrild* v. *Hansen,* 1946 U.f.R. 262; *Perssons* v. *Brødrene Jørgensen,* 1959 U.f.R. 410. For German case law see *supra,* p. 157. See also Restatement Second § 346 1.

[2] Denmark: *Zimmerbeutel* v. *Berg,* 1954 U.f.R. 891.

[3] Sweden: *Mauser-Werke A/S* v. *Arméförvaltningen,* 1930 N.J.A. 507.

[4] Denmark: *Livs- og genforsikringsselskabet Dana* v. *Heirs of F. C. Saugman,* 1926 U.f.R. 23; Norway: *Coward's Heirs* v. *Försäkringsaktiebolaget Skandia,* 1926 N.Rt. 35.

mentioned above on pp. 177 f., but the use of an adhesion contract makes this rule of presumption considerably stronger.

If the adhesion contract is based upon another law than that of the place of the enterprise, this latter law should apply. This may occur when the contract is made for a specific foreign market, as in the case of some Scandinavian gold bonds which were meant for and issued upon the American market.[5] This presumption, however, should only exist in a case where the parties are free to stipulate the contents of the contract, not in a contract which in the forum country or in some other country closely connected with the contract is tainted with *dirigisme;* see, on the presumption in favour of the validating law, *infra,* p. 185.

2. It has rightly been stated by Scandinavian as well as by English, French, and German courts that an *arbitration clause* is a tacit agreement to apply the law of the place of arbitration and that a clause by which the parties have agreed that a court shall have exclusive jurisdiction over disputes generally indicates that they intend the law of the forum to apply.[6]

The Hague Convention on the Law Applicable to International Sales of Goods, however, does not accept tacit party references and concequently a forum clause will not be considered as being equal to a party reference.

3. The fact that the parties have used a *contract form* and thereby adopted the language and legal expressions of one country is in itself not a very strong indication that they agreed upon its law. But if the language and the legal expressions are those of one

[5] Denmark: *Söderberg* v. *København̊s Telefon Aktıeselskab,* 1935 U.f.R. 82; *Vereinigung voor dem Effectenhandel te Amsterdam* v. *Finansministeriet,* 1939 U.f.R. 296. Norway: *Stavanger Sparekasse et al.* v. *Finansdepartementet,* 1937 N.Rt. 888. Sweden: *Försäkringsaktiebolaget Skandia* v. *Riksgäldskontoret,* 1937 N.J.A. 1.

[6] Denmark: *Salomon* v. *Garrigues,* 1851 J.U. 545; *Herklotz* v. *Ekberg,* 1899 U.f.R. 995; *Maschinen und Armaturenfabrik* v. *Hugo Wulff,* 1914 U.f.R. 148; *Hafnia* v. *Maren Christensen* 1928 U.f.R. 1045. Norway: *Forsikringsaktieselskapet "Vesta"* v. *Rederiaktiebolag "Fina",* 1949 N.D.S. 409; *Tandberg* v. *Braadvent,* 1897 N.Rt. 289; *Deutsche Central Boden Credit A/B* v. *Johnson, 1934* N.Rt. 549. Sweden: *Clapman & Co.* v. *A. F. Scharins Söners efterträdare,* 1899 N.J.A. 184. Germany: RG 3-2-1933, IPRspr. 1933 No. 10; OGH BrZ 4-5-1950, IPRspr. 1950–51 No. 18. France: Cass, civ. 28-6-1937, Rev. Crit. 1938–62 and Batiffol, p. 134 No. 152. England: *Royal Exchange Assurance Corp.* v. *Sjöförsäkringsaktiebolaget Vega,* 2 K.B. 384 (1902); *Hamlyn & Co.* v. *Talisker Distellery,* A.C. 202 (1894); *N. V. Kwik Hoo Tong Maatschappij* v. *James Finlay & Co. Ltd.,* A.C. 604 (1927). For USA see Restatement Second § 332 a.

of the parties, this—according to some English[7] decisions—should be an indication that they wanted that law to apply.[8] The fact, however, that a party has not understood that the law of the other party should apply, has been accepted by Scandinavian courts as an excuse for the application of his law, especially if it was the law of the forum.[9]

4. Finally, there should be a presumption in favour of applying the *validating law* in cases where one or several of the laws with which the contract has a relationship invalidates the transaction and where one or several other laws validate it. This presumption supported by English,[1] French,[2] American[3] and Scandinavian[4] cases, however, should only exist in contracts where freedom of bargaining exists, and—as American cases show—not in labour, life insurance, or conditional sales contracts where mandatory rules in the law of the place of work, the law of the insured party's domicile, or the law of the seat of the goods offer protection to the worker, the insured party or the buyer against the other and stronger party.

§ 6. THE SCOPE OF THE PROPER LAW

In Scandinavian law the majority of the questions of formation, validity, and performance of a contract are, as mentioned above on p. 120, all governed by a single law, the proper law of the contract. However, there are exceptions.

[7] E.g. *The Industrie* (1893), p. 58.

[8] Denmark: *Eleghorn* v. *Caröe & Co.*, 1901 U.f.R. 900. Norway: *Claus Vedeler Haerem* v. *Rydtun & Co.*, 1922 N.Rt. 635, *Tandberg* v. *Braadbent*, 1897 N.Rt. 289. Sweden: *Chapman and Co.*, v. *A. F. Scharins Söners efterträdare*, 1899 N.J.A. 184.

[9] Denmark: *Grön* v. *Münchener Gjenforsikringsaktieselskab*, 1895 U.f.R. 139; *C. K. Hansen* v. *Christiansholms Fabrikker*, 1904 U.f.R. 267. Sweden: *M. S. Emma* 1917 N.J.A. 87 and 89.

[1] E.g. *In Re Missouri Steamship Co.*, 42 Ch. D. 321 (1889).

[2] E.g. Cass. civ. 5-12-1910, Sirey 1911-1-129.

[3] See cases mentioned in Restatement Second, p. 60 (ad § 334 d on Usury).

[4] Denmark: *Rosengaard* v. *Strandgaard, Kjær & Namestad*, 1904 U.f.R. 1; *Monies* v. *Rosengaard*, 1904 U.f.R. 503. Sweden: *Högstadius et al.* v. *Hammarin*, 1941 N.J.A. 350.

1. A person's *capacity* is governed by his personal law. In Denmark and Norway, this is the law of his domicile, in Sweden the law of his nationality.

The Danish jurist Borum asserts, however, that a foreigner who lacks capacity under his personal law should become bound by a contract made in Denmark if under Danish law it is valid and if the other party has acted in good faith.[5] The rule is identical with the one developed in French case law[6] and has been incorporated in a Swedish statute. The other party acts in good faith if he is not aware of the incapacity of the foreigner under the personal law or if he has no reasonable grounds for questioning his capacity.

The rule only gives protection to the party dealing in the forum country with a foreigner lacking capacity under his personal law. This in France has been explained by the so-called "doctrine of national interest".[7] Foreign parties dealing in their own countries with incapacitated Frenchmen and acting in good faith will receive no protection—and could by reason of the provision in Article 3 of the *Code civil* not be protected by the French courts. In Denmark, however, where no such statute exists, it would be fair to give the same protection to foreign parties contracting in good faith with Danes in countries where these Danes would have had capacity to contract.[8] As most Western countries now have a majority age of 21 years and as trade with the countries of the Eastern bloc, where the majority age is 18, is negligible, the problem has not yet been of great practical importance.

2. *Formalities* are governed by the law of the contract. But a contract will probably not be held invalid if it complies with the formal requirements of the law of the place of making. One may here speak of a rule of alternative validation.[9]

3. Some questions concerning the *mode in which performance is to take place* and other minor details of performance are governed by the law of the place of performance. This seems to be generally accepted among the laws.

[5] Borum, p. 100.
[6] The *Lizardi* case, Cass. Req. 13-1-1861, Sirey 1861-1-305.
[7] See Batiffol, p. 329 No. 369.
[8] See Lando, *Kontraktstatuttet*, pp. 348 ff.
[9] See German EGBGB Art. 11.

4. As a general rule, the courts of Denmark, Norway and Sweden apply the law of the contract to questions concerning its *formation*. This implies that the law which will govern if an agreement is validly concluded decides whether such formation has occurred. This includes the so-called meeting of minds. In one case, referred to as the *Nitedal* case,[1] a lady (of Norwegian origin) living in the United States had in a letter written in Norwegian offered some land which she owned in Nitedal in Norway to the tenant. The tenant accepted, but the lady alleged in the proceedings that he had accepted too late. The majority of the Norwegian Supreme Court held that she was bound by the acceptance solely on the grounds, valid under Norwegian but not under American law, that she had not immediately notified the tenant of her refusal to acknowledge the acceptance on the ground that it had arrived too late. This decision has been criticized by writers[2] who, with the minority of the court, would have recommended the application, in such a non-commercial matter, of the requirements of both American and Norwegian law for the conclusion of the contract.

In principle, the law of the contract should, according to the present writer, govern the question of the meeting of minds. This is in accordance with English,[3] German[4] and French[5] law. Only in exceptional cases should the requirements of the law of the domicile of one party be cumulated with those of the law of the contract. Situations can be imagined where a party would incur hardship if he were bound by a certain behaviour, for instance by inaction, when this effect is unknown in his own law. It is doubtful whether there was sufficient basis for such an exception in the *Nitedal* case, in which the negotiations concerned a sale of a Norwegian immovable and took place between persons of Norwegian origin and in the Norwegian language. The outcome might, however, not have been the same had the seller in such a non-commercial matter been a third- or fourth-generation American. For such cases, the reasoning of the minority seems justified.

[1] *Aas* v. *Hermansen*, 1924 N.Rt. 1181.
[2] Borum, p. 152; Raape, 4. Aufl., 457.
[3] *Albeko Schuhmaschinen A. G.* v. *The Komborian Shoe Machine Co. Ltd.*, 111 L. J. 519 (1961).
[4] RG 13-2-1933, IPRspr. 1933 No. 10.
[5] Batiffol, p. 338.

The law of the contract will also as a rule govern the question whether the contract suffers from defects of consent. Thus, the Municipal Court of Oslo has held questions of duress and consideration to be governed by the proper law of the contract.[6] Some Norwegian fishermen had by threatening to strike on the high seas induced the English owner of their vessel to promise higher pay. The promise would have been void by Norwegian law because of duress, but the court held it invalid by English law for lack of consideration. In an earlier case, however, the Norwegian Supreme Court said *obiter* that the question of fraud must be governed by Norwegian law as being the law of the forum, if the proper law of the contract would have tolerated an agreement void by Norwegian law.[7] This suggests that in questions such as fraud, duress, coercion and undue influence, where ethics are involved, the substantive law and the moral standards that support the *ordre public* are so closely related, that behaviour invalid for one of these reasons under the law of the forum would not be upheld even if it were allowed by the proper law.

5. A difficult problem arises concerning the authority of the agent contracting with third parties, his *power* to affect the rights and duties of the principal, or in other words, the relationship between agent and principal. In many cases, the authority given to the agent by the principal differs from the power of the agent in dealing with third parties. The latter is often wider than the scope of the agent's authority in relation to the principal.

In this field, the conflict rules should have the same underlying reasons as those of the substantive law in many countries. On the one hand, the law must give the principal a means to exercise some control over the ultimate extent of his obligations. On the other hand, security in commerce demands that a third party dealing with the agent shall be able without difficulty to obtain information concerning the agent's power to act.

Some writers have suggested that this question should be governed by the proper law of the contract, either the agreement between the agent and the principal or the contract with the third party. Others have been of the opinion that the power of an agent to affect the rights and duties of the principal should

[6] *Blix et al.* v. *Millward,* 1936 N.Rt. 900.
[7] *Selmer* v. *Thams,* 1931 N.Rt. 1186.

have its own proper law, either the law of the principal's domicile, the law of the agent's domicile, or the law of the place where the agent acts.

Roman law knew no distinction between the internal relationship between principal and agent and the external relationship between the principal and the third party. This distinction, originally made by the German lawyer Laband,[8] has had no influence on French and Italian conflict of laws. Batiffol[9] for instance is of the opinion that *the proper law of the contract of agency,* preferably the law of the place of performance, should decide every question arising out of the relationship, including what in our terminology is called the problem of the agent's power. As a general rule French and Italian courts seem to prefer this solution.[1] As will be seen, the law of the place of performance of the agency contract in most cases coincides with the law of the place where the agent acts, and in my opinion the latter is to be preferred. However, where the law of the agency contract does not coincide with that of the place where the agent acts—where for instance the law of the principal's domicile has been agreed upon by the parties—the third party may not know which law governs as between the agent and the principal and, even if he does know, the rules applicable may be unfamiliar and inaccessible to him. The law of the agency contract cannot therefore be accepted as a general rule.

It is desirable that most questions arising out of a contract should be governed by one law, the proper law of the contract. In Continental thinking, the authority of the agent is one of the prerequisites to the formation of a valid and enforceable contract with the third party; consequently, the proper law of the contract with the third party ought to be applied. There must at least be strong reasons for deviating from this rule.

Such reasons do exist, however. The principal cannot always check with whom and on what conditions the agent acts. The agent and the third party may choose a law, the authority rules of which are unknown to the principal. Or, without making such a choice, they may locate the contract in such a country by their designation of the place of performance and of the place of pay-

[8] *Zeitschrift für das gesamte Handelsrecht und Konkursrecht,* 1879, pp. 183 ff.
[9] Batiffol, p. 285.
[1] Batiffol, p. 285.

ment, etc. It would not be equitable if as a result the principal were to be unable to control the applicable law.

In the English case *Sinfra Ltd.* v. *Sinfra Aktiengesellschaft*[2] Lewis J. said, "A power of attorney is a one-sided instrument ... the proper law for an English court to apply is the law of the country in which the power is to operate". Though some earlier English cases may be interpreted differently, this case and the leading case of *Chatenay* v. *Brazilian Submarine Telegraph Co.*[3] show that the proper law of the contract with the third party and the proper law of the power of attorney are not identical. In many cases, however, they do coincide, a fact that has often blurred the distinction.

In the doctrine of the 19th century, the law of the principal's domicile was supposed to govern the question of the agent's authority. Both Story[4] and von Bar[5] advocated this view. It is still believed that the authority of the legal representative (guardian, parent, etc.) should be governed by the law by which the authority is given, ordinarily that of the domicile of the person represented. Presumably this would be the result in Danish law. The same rule, though with less predictability, could be expected to apply to the authority of the manager and board of directors of a corporation, governed by the law of the seat of the company, and of the so-called *prokurist* in Scandinavian, German and Italian law. Foreign cases support this solution. As far as the *prokurist* is concerned, some Swedish cases have held the law of the principal applicable.[6] Finally, it has been held by English courts, in the famous case of *Lloyd* v. *Guibert* (1865)[7] and perhaps more clearly in *The Gaetano and Maria* (1882),[8] that the law of the flag decides the shipmaster's powers. French and American courts have reached the same conclusion. The rule is almost universally approved in the doctrine and is supported by the facts that a shipmaster may act in any country so that the application of the *lex loci actus* might be unfair to the shipowners and that the captain generally deals with people who know about foreign trade

[2] 2 All E.R. 677 (1939).
[3] 1 Q.B. 79 (1891).
[4] Story, 8th ed. 1883 par. 286 b.
[5] Von Bar II, p. 69.
[6] *Bertling* v. *Lundstedt*, 1922 N.J.A. 276; *A/S Jacobsens Farveudsalg* v. *A/B Wilhelm Becker*, 1924 N.J.A. 4.
[7] L.R. 1 Q.B. 165.
[8] 7 P. 137.

and who are often aware of peculiarities in the maritime law of most countries.

Apart from these exceptions, the law of the principal's domicile should not be applied. When the agent acts in another country than that of the principal's domicile, it is a heavy burden to lay upon the third party to expect him to know the principal's law. Sometimes he does not even know that he is dealing with the agent of a foreign principal, and even if he does, it may be difficult to acquire a reliable knowledge of the foreign law. The application of this law would in fact hamper foreign trade, as it might deter people from doing business with foreigners. A rule set up to protect the principal might thus prove to be to his disadvantage.

The same reasons lead to the exclusion of the law of the agent's domicile in cases where it differs from the law of the place of acting.

The law of the place where the agent is physically present when the contract is made is to be preferred for several reasons. It gives the third party adequate protection. As most powers of attorney and other acts conferring authority are geographically limited the principal may, before authorizing the agent, obtain information concerning the law of the place or places where the agent is to act. In fact, it is more reasonable for him to do so than for the third party to procure information as to the law of the principal: "When in Rome do as the Romans do."

As has been said before, the English courts seem to prefer the *lex loci actus* rather than the proper law of the third party contract. The Swiss and German courts seem to adhere to the same rule and the American courts are said to do the same, although it seems difficult to discover a quite definite line in the numerous American cases. The American Restatement on the Conflict of Laws[9] seems to prefer the law of the place in which the agent is authorized to act. The Benelux Draft Convention on Private International Law of 1951 agrees to apply the law of the place where the agent acts.

In the Danish case decided by the Commercial and Maritime Court of Copenhagen in 1923[1] it was held that the power of an agent acting for a Danish corporation in Batu to issue assign-

[9] Restatement §§ 344 and 345.
[1] *Prince Dschewachoff* v. *The Caucasion Oil Co. Ltd.*, 1923 SHT 209.

ments was to be decided according to Russian law. No reason for this was given; the place in Russia where the act was done and the agent's domicile seem to have coincided. Russian law also was the proper law both of the assignments and of the contract entered into in connection therewith. The decision shows that Danish courts are not likely to apply the law of the principal and do not seem to be averse to applying *lex loci actus.*

It is doubtful which law should govern in cases where the authority is not geographically limited or where the limits are so widely drawn that it is practically impossible to know all the legal systems that might apply if the *lex loci actus* rule is accepted. It is submitted that the conflict rule for these cases must be chosen by an evaluation of whose interests are most in need of protection, those of the principal or those of the third party. As it is left to the principal to decide the limits of the power in this respect and the question of what he has decided should be governed by his own law, it is more reasonable that he should take the risk of a difference in the authority rules between his *lex domicilii* and the *lex loci actus* than that the third party should do so. Therefore the law of the place where the agent acts should apply.

Though *prima facie* it might seem reasonable to apply the law of the principal when it is more favorable to the third party than the law of the place of acting, such an exception from the general rule should not be allowed. As in the case decided by the German *Reichsgericht,* Jan. 14, 1910,[2] the law of the principal cannot be applied even if it confers wider powers upon the agent than does the *lex loci actus.* The third party has no reasonable expectation that this "alternatively validating" application of the two laws should be recognized, and it might often be too burdensome for the principal if the agent had powers wider than in either of the two legal systems. The notion of alternative validation known in the field of formal requirements of transactions should have no application here.

6. According to Scandinavian law *statutes of limitation* are rightly considered part of the substantive law and the foreign limitation rules of the proper law are applied. In one case the Swedish Supreme Court[3] has applied the statute of limitation of

[2] See Rabels Z. 1929, p. 813.
[3] *Carlstein* v. *Carlstein,* 1930 N.J.A. 692.

Massachusetts to an agreement which was governed by the law of Massachusetts irrespective of the procedural character of the statute by the law of that state. The Danish Supreme Court has applied the corresponding English statute of limitation to an English debt, but in that case nobody seems to have given thought to the fact that in England the statute belonged to the law of procedure.[4]

ABBREVIATIONS

Books and articles cited by the name of the author are to be found in the Bibliography.

AC = Appeal Cases, English Law Reports.
AcP = Archiv für die civilistische Praxis.
All ER = All England Law Reports, Annotated.
Am. J. = American Journal of Comparative Law.
ARS = Arbeitsrechtssammlungen (Entscheidungen des Reichsarbeitsgerichtes, der Landesarbeitsgerichte und Arbeitsgerichte).
Atl. = Atlantic Reporter (National Reporter System, United States)
Atl. 2d = Atlantic Reporter (National Reporter System, United States) Second Series.
AWB = Aussenwirtschaftsdienst des Betriebsberaters.
BAG = Bundesarbeitsgericht.
BG = Bundesgericht (Swiss).
BGE = Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung (Swiss).
BGB = Bürgerliches Gesetzbuch.
BGH = Bundesgerichtshof.
BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen.
Bing. = Bingham, English Common Pleas.
Burr. = Burrow, English King's Bench Reports.
CA = Court of Appeal.
Cass. (civ., req., comm., réunie) = Cour de Cassation, Chambre civile, des Requêtes, commerciale, réunie.
CC = Code Civil, Codice civile.
Ch. = Chancery Division, English Law Reports, 1891.
D = Dalloz, Receuil périodique et critique de jurisprudence, de législation et de doctrine.
Dig. = Digesta.
DL = Christian den Femtis Danske Lov.
EGBGB = Einführungsgesetz zum Bürgerlichen Gesetzbuch.

[4] *Beyer* v. *Beyer*, 1925 U.f.R. 839.

F = Federal Reporter.
F 2d = Federal Reporter, Second Series.
F Supp. = Federal supplement.
HL = House of Lords.
HGB = Handelsgesetzbuch.
ICLQ = International and Comparative Law Quarterly, has succeeded ILQ
ILQ = International Law Quarterly.
IPRspr = Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts. Beilage der Zeitschrift für ausländisches und internationales Privatrecht (Rabels Zeitschrift).
IZRspr = Die deutsche Rechtsprechung auf dem Gebiete des interzonalen Rechts. Beilage der Rabels Zeitschrift.
JU = Juridisk Ugeskrift.
JW = Juristische Wochenschrift.
KB = King's Bench Division. English Law Reports.
KG = Kammergericht.
LAG = Landesarbeitsgericht.
L. Ed. = Lawyer's Edition, United States Supreme Court Reports.
LJ = Law Journal.
LG = Landesgericht.
Ll. L. Rep. = Lloyd's List Law Reports.
L.R. Ch. = English Law Reports, Chancery Appeal Cases 1866–1875.
LTR = Law Times Reports.
Mass. = Massachusetts (Reports).
MDR = Monatschrift für deutsches Recht.
NDS = Nordiske domme i søfartsanliggender (Oslo).
NE = Northeastern Reporter (National Reporter System, United States).
NE 2d = Northeastern Reporter (National Reporter System, United States). Second Series.
N.J.A. = Nytt juridiskt arkiv (Swedish).
NJT = Nyt Juridisk Tidsskrift (Danish).
NJW = Neue juristische Wochenschrift.
N.Rt. = Norsk Rettstidende (Norwegian).
NW = North Western Reporter (National Reporter System, United States).
NY = New York Court of Appeals Reports.
NY Supp. = New York Supplement Reports (National Reporter System, United States).
OAG = Oberappellationsgericht.
OGH Brit. Zone = Oberster Gerichtshof für die britische Zone.
OLG = Oberlandesgericht.
P = English Law Reports, Probate Division.
Pa. = Pennsylvania (Reports).
Pac. = Pacific Reporter (National Reporter System, United States).

Pac. 2d = Pacific Reporter (National Reporter System, United States). Second Series.
Penant = Recueil général de jurisprudence, de doctrine et de législation coloniale.
QB = Queen's Bench, English Law Reports, 1891–.
QBD = English Law Reports, Queen's Bench Division 1876–90.
Rabels Z = see ZAUSL.
RAG = Reichsarbeitsgericht.
RAGE = Entscheidungen des Reichsarbeitsgerichtes.
Recueil = Recueil des cours de l'Académie de droit international de la Haye.
Restatement = Restatement of the Law of Conflict of Laws, as adopted and promulgated by The American Law Institute at Washington, 1934.
Restatement Second = Restatement of the Law, Second, Conflict of Laws, Tentative Draft no. 6. Chapter 8. Contracts. April 22, 1960.
Rev. crit. = Revue critique de droit international privé.
Req., se Cass.
RG = Reichsgericht.
RGZ = Entscheidungen des Reichsgerichts in Zivilsachen.
Seuffert = Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten.
S = Sirey, Recueil général des lois et des arrêts.
S. Ct. = Supreme Court Reporter (National Reporter System, United States).
SE = Southeastern Reporter (National Reporter System, United States).
SE 2d = Southeastern Reporter (National Reporter System, United States). Second Series.
SHT = Sø- og Handelsretstidende (Danish).
Sirey, see S.
So. = Southern Reporter (National Reporter System, United States).
So. 2d = Southern Reporter (National Reporter System United States). Second Series.
SW = Southwestern Reporter (National Reporter System, United States).
SW 2d = Southwestern Reporter (National Reporter System, United States). Second Series.
T.f.R. = Tidsskrift for Rettsvitenskap (Oslo).
TLR = Times Law Reports.
Trib. civ. = Tribunal civil.
U.f.R. = Ugeskrift for Retsvæsen (Danish).
US = United States Reports.
WLR = Weekly Law Reports.
V.L.T. = Vestre landsrets Tidende (Danish).
Warn or Warneyer = Die Rechtssprechung des Reichsgerichts auf dem Gebiete des Zivilrechts, published by O. Warneyer.
ZAUSL = Zeitschrift für ausländisches und internationales Privatrecht.

Since 1961 called Rabels Zeitschrift für ausländisches und internationales Privatrecht.
ZfdgesH = Zeitschrift für das gesamte Handelsrecht.
ZIR = Niemeyers Zeitschrift für internationales Recht.
ZPO = Zivilprozessordnung.

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