CHAPTER 48

Extracontractual Obligations

SOME codifications have stated as a general rule that all obligations arising without contract are governed by the law of the place where the act creating the obligation is done.¹ This rule is either trite or wrong. Our conflicts rule determines whether we recognize a foreign law as the origin of an obligation and the law so recognized decides what elements create the obligation.

Nothing better is achieved by general rules placing “quasi contracts” under the law of the place where the obligating act is done.² Quasi contract is not a useful term. From its range, three topics require a report on the actual state of the doctrine.

I. VOLUNTARY AGENCY (NEGO TORIUM GESTIO)³

In the old doctrine of civil law derived from Roman and Byzantine sources, altruistic intervention in the interest of another person is considered as a praiseworthy activity, suitable to Christian readiness to help. English courts have taken the contrary attitude in damning “officious meddling.” In the United States, this hostility to voluntary taking care

¹ Italy: Disp. Prel. C.C. (1942) art. 25 par. 2.
Poland: Int. Priv. Law, art. 11 par. 1.
Rumania: C. C. (1940) art. 42.
² Belgian Congo: C. C. art. 11 par. 3.
Spanish Morocco: Dahir of 1914, art. 21.
Tangier: Dahir of 1925, art. 16 par. 2.
Córdigo Bustamante, art. 222.
³ Comparative municipal law, American and Roman laws: Heilman, “Rights of the Voluntary Agent Against His Principal in Roman Law and in Anglo-American Law,” 4 Tenn. L. Rev. (1926) 34-54, 76-95.

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of the business of another has been maintained in principle, but it is riddled with a great many exceptions. Occasionally, American law has been more generous than certain civilian doctrines. Where there is a duty implied by law to preserve human life or property, the work and labor spent to this end may be compensable in American courts, a result not always reached by German courts.  

Due to the contrasts in history and development, it is understandable that the conflicts problems of this subject have been discussed almost exclusively in the Continental literature.

1. Usual Conflicts Theories

The traditional doctrine, basically territorial in its origin, has split on a systematic question. Roman law establishes two actions. The actio directa belongs to the person in whose business or sphere the intervention occurred, the dominus negotii, and is directed to recovery of the gain the gestor may have made and of the damage he may have caused by negligence. By the actio contraria, the acting person, if conditions are present, sues for restitution of expenses. Writers regarding the existence of these two actions as the only effect of voluntary intervention concluded that each action had its own law. The direct action would be localized at the place where the act of interference is done, and the counterclaim would be governed by the law of the principal. When, to the contrary, the medieval construction

4 HEILMAN, supra n. 3, at 83 ff.; American Law Institute, SEAVEY and SCOTT, Notes on Certain Important Sections of Restatement of Restitution 171 ff. § 117.

Germany: The problem whether more than expenses is recoverable, has been controversial. OLG. Celle (Nov. 10, 1905) 12 ROLG. 272 and OLG. Kiel (Oct. 9, 1906) 18 id. 22 granted physicians' fees, characterizing labor spent by a professional man as expenses. In ENNECCERUS-LEHMANN, 2 Derecho de obligaciones (Recht der Schuldverhältnisse, translation by PÉREZ GONZÁLEZ y ALGUER, 1933) 353, note to § 164, it is noted that in Spain probably all useful expenditures may be recovered.
of the actions as flowing from a phenomenon similar to a contract, a quasi contract, was followed, the entire effects were subjected to a single law.\textsuperscript{5} With various motivations, the modern theory has preferred the latter result. The applicable law has been found in the place where the agent accomplishes his intervention.\textsuperscript{6}

In one opinion, however, exceptions are made in case the agent takes care of an entire unity of assets; in the absence of a single place of acting the law of the principal should be stressed.\textsuperscript{7}

On the other hand, the domicil of the principal has been indicated as the dominating contact because his interest prevails in the institution.\textsuperscript{8}

2. Distinctions

Some authors have noticed that the circumstances of the cases must be considered.\textsuperscript{9} In this view, where a contractual relation connects the principal and agent, the law governing the contract must extend to the effects of acts by the agent that exceed his authority.\textsuperscript{10} This is the correct point of view and should be enlarged to include any preceding contractual or legal relationship.

\textsuperscript{5} For the first opinion, REGELSBERGER, Pandekten 175 and n. (g); 2 MEILI 86; WEISS, 4 Traité 413; 2 FRANKENSTEIN 395. \textit{Contra:} PILLET, 2 Traité 310 f. (nationality of the principal); POULLET 352 f.; PACCHIONI 332 f.; SAUSER-HALL, 44 Z. Schweiz. R. (N. F.) (1925) 296a. The same result is based on the presumptive intention of the agent by ROLIN, 1 Principes §§ 358, 362; 3 id. § 1059 f.; \textit{contra:} 2 ARMINJON § 118, e.g., BUSTAMANTE, 2 Der. Int. Priv. 312.

\textsuperscript{6} CHINA: Int. Priv. Law, art. 24.
JAPAN: Int. Priv. Law, art. 11 par. 1.
Código Bustamante, art. 220.
See e.g., FIORE, Clunet 1900, 458; Note, RICCI-BUZATTI, 1 Rivista (1906) 213; PILLET, 2 Traité 310 § 547 bis.

\textsuperscript{7} PILLET, 2 Traité 311; 2 ARMINJON § 118.

\textsuperscript{8} NUSSBAUM, D. IPR. 295 and n. 3 in fine; Swiss BG. (Nov. 25, 1905) 31 BGE. II 662, 665.

\textsuperscript{9} NEUMEYER, IPR. 32; 2 FRANKENSTEIN 394 n. 44.

\textsuperscript{10} See in particular, M. WOLFF, Priv. Int. Law 507 § 481.
After the First World War, it was a situation familiar to the mixed arbitral tribunals that a contract involving some kind of custody—sale, agency, bailment, etc.—was deemed retroactively dissolved by the Treaty of Versailles as of the time when the parties became enemies, but the custodian had continued to act during the war. This was done either in his own interest on the basis of the contract or to safeguard the interest of the other party. In the latter case, his acting, deprived of its contractual foundation, could be construed as voluntary agency. Acting in self-interest could possibly constitute a so-called quasi negotiorum gestio, that is, intervention of a person in the business of another person in the belief that it is his own.11 The mixed arbitral tribunals were first inclined to deny a German party any excuse for continuing to act, but finally considered the war period of suspension as a sequel to the contract. Hence, the law governing the contract extended to the additional relationship. The same result obtained ex fortiori when the contract remained in force by exception.

Illustration. A Rumanian firm before the war deposited ten oil tank cars with a German firm. This contract was not dissolved by the Treaty. At a time when it seemed reasonable, the cars were sold in the interest of the owner but with loss. The court justified the application of German law to the contract of deposit and concluded without any question that the German provisions on negotiorum gestio should be applied.12

If the German firm would have had to sell the cars in Belgium, it would be absurd to apply Belgian law. Suppose the contract had been dissolved by the war. The extension

of the law governing the former contract would be equally satisfactory.

3. Maritime Assistance and Salvage

When in a famous dictum, Lord Bowen formulated the aversion of common law to voluntary agency, he contrasted the principle, "liabilities are not to be forced upon people behind their backs," with the recognized exceptions of maritime law as to salvage, general average, and contribution.\textsuperscript{13} Despite the universal background of general maritime law, however, national differences in the treatment of assistance and salvage were numerous, and conflicts theories abounded,\textsuperscript{14} while very few laws attempted a solution.\textsuperscript{15} The multilateral Brussels Convention of September 23, 1910, adopted by the United States and many other countries,\textsuperscript{16} has eliminated most, though not all, conflicts among the participant powers and is applied in member states even though the other state involved is not a member.\textsuperscript{17} Some conflicts rules are included in the Convention.\textsuperscript{18}

Remaining problems seem to be considered subject to the \textit{lex fori} as general maritime law when jurisdiction is taken in an English or American admiralty court. In civil law they are at present prevailingly treated by the law of the flag if it is common to both parties,\textsuperscript{19} and otherwise by the

\textsuperscript{13} Falcke v. Scottish Imperial Ins. Co. (1886) 34 Ch. D. 234, 248.
\textsuperscript{14} For surveys, see 2 Répert. (1929) 69 ff.; 2 Arminjon (ed. 2) 338 ns. 2-7; 2 Streit-Vallindas 268; 2 Frankenstein 553 ff.
\textsuperscript{15} Portugal: C. Com. art. 690 is known as an exception.
\textsuperscript{17} Art. 15.

On the distinction between contractual and extracontractual duties, see Le Brun, "Assistance, sauvetage et obligation de service," 1 Revue Trim. D. Com. (1948) 388.
\textsuperscript{18} Arts. 6 par. 1, 9 par. 1, 10 par. 2, 15 par. 2.
\textsuperscript{19} Germany: RG. (June 15, 1927) 117 RGZ. 249.
national law in force in territorial waters. But where
the act occurs on the high seas, or begins there and termi-
nates in a port, the opinions are extremely divided.

A convention on assistance and salvage of aircraft, of
Brussels, 1938, has not gathered sufficient ratifications.
The efforts to fill the gaps of unification are being continued.

II. Unjust Enrichment

A. IN GENERAL

Restitution of enrichment obtained without just cause,
a favorite of Justinian’s compilators and of the Continental
common practice at the time of the natural law, has found
its most complete development in the German Civil Code
and comments, and recently in the American Restatement
of Restitution. An enormous mass of apparently hetero-
geneous situations is covered thereby. In France and other

20 Portugal: C. Com. art. 690.
Treaty of Montevideo on Int. Com. Navigation (1940) art. 12; DIENA, 3
Dir. Com. Int. 396; WEISS, 3 Traité 413 n. 2.
21 Particularly: Law of the salvaging vessel, or of the salvaged vessel,
or lex fori. See for France, DESPAGNET 931; 2 ARMINION (ed. 2) 338; RIPERT,
3 Droit Marit. § 2207; 2 Répért. 72 f; NIBOYET, 54 Traité 506.
For Germany: NEUMEYER, IPR. 33, incorrectly opposed by 2 FRANKENSTEIN
558 n. 226.
Treaty of Montevideo on Int. Com. N avig. (1940) art. 12 applies the law
of the flag of the salvaging vessel.
22 See 1 Int. L. Q. (1947) 505, and the Convention Draft of September 28,
1938 in BENEDICT, 6 American Admiralty 203.
Guatemala has ratified, see MATOS 566.
23 Comparative writing on municipal laws: FRIEDMANN, Die Bereicher-
ungshaftung im anglo-amerikanischen Rechtskreis (1930); id., “The Principle
and DAVID, “The Doctrine of Unjustified Enrichment,” 5 Cambr. L. J. (1934)
204. Instructive with respect to the divergence of American and English laws,
SCOTT and SEAVEY, “Restitution,” 54 Law Q. Rev. (1938) 29. A compre-
hensive, comparative article in 7 Rechtsvergl. Handwörterbuch is not
available.
Comparative conflicts law: surveys of literary opinions have been afforded
by GUTTERIDGE and LIPSTEIN, “Conflicts of Law in matters of Unjustifiable
Enrichment,” 7 Cambr. L. J. (1941) 80; Anon., 10 Répért 776; FICKER, 4
Rechtsvergl. Handwörterbuch (1929) 387; and most Continental and Latin-
American treatises. There is not even accord among these reports about the
views attributable to the sketchy treatment by writers.
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civil law countries, the codes have prevailingly restricted their attention to *condictio indebiti*, the recovery of a payment not due, which is therefore alone considered in the bulk of the conflicts literature, while the more recent French doctrine using the name of *action de in rem verso*\(^{24}\) has been scarcely noted. The English action of *indebitatus assumpsit* produced in an early period the actions for money had and received and *quantum meruit*, with an important though by no means exhaustive scope.

Heavy problems burden not only the less advanced theories of unjust enrichment; new problems arise with elaboration of the system. At the same time the slowly growing popularity of the subject multiplies the cases revealing divergent solutions.

The differences are caused much more by legal intricacies of technique than by contrasting ideas of justice. But there exist also divergencies of the latter kind. Although the entire institution rests everywhere upon equity, the concept of equity varies. If, for instance, someone in the mistaken belief that he owns a motor car, causes it to be painted, in this country it is thought unfair to let him have compensation for the plus value of the car;\(^{25}\) in this special case Romanistic doctrine does not even need the action for unjust enrichment since compensation is provided by the principles of vindication.\(^{26}\)

In conflicts literature, including the Restatement, the subject has often been discussed, but in an offhand manner until very recently when the real problem was discovered. But only tentative propositions in illustrative cases have been advanced. A promising study on the same basis of

\(^{24}\) With more justification, the Austrian doctrine has taken § 1041, Allg. BGB. as the starting point for developing a modern *actio de in rem verso* different from the action based on enrichment. (A good illustration of the distinction: 97 RGZ. 61 at 65.)

\(^{25}\) SCOTT and SEAY, "Restitution," 54 Law Q. Rev. (1938) 29 at 36.

\(^{26}\) German BGB. § 996; cf. § 818 par. 2.
comparative research as underlies the present work is announced, and should provide the needed monograph for which the following remarks are no substitute.

Judicial decisions have been declared missing in the United States and England. Few are available on the Continent.

At least it is certain that however narrow the domestic scope of unjust enrichment may be, foreign application of this institution is definitely recognized. With regard to the peculiar English treatment of foreign tort actions, it has been noted that recovery of values based on an applicable foreign law of unjust enrichment is enforceable without requiring an English parallel. This thesis finds support in a decision of the Court of Appeal.

B. THE CONFLICTS THEORIES

1. Connection with a Fact

(a) Place of enriching act. In Belgian and French literature it has often been proclaimed that the decisive place is where the defendant completes the acquisition said to be his enrichment. Thus the law of the place where a sum not due is paid governs its recovery. This widely held, though

28 2 Beale 1429; Gutteridge, 7 Cambr. L. J., supra n. 23, at 82. Universal Credit Co. v. Marks (1933) 164 Md. 130, 163 Atl. 810, 816 does not speak of an obligation but only of a burden to pay unless a lien be lost under Maryland law.
29 Batthyany v. Walford (1887) 36 Ch. D. 269; Gutteridge, supra n. 23, 83 f. (the case mentioned awakens my early personal memory since my father was one of the plaintiff prince’s experts heard by the court on the law of family fideicommisses).
30 Belgium: Rolin, 1 Principes 568 § 362; Poulet § 315.
Brazil: Bevilacqua 371.
France: 1 Foelix 238; Bartin, 1 Principes 187; Lerebours-Pigeonnière § 252; Batiffol, Traité 564 § 564.
Italy: Cereti, Obblig. § 76.
Japan: Int. Priv. Law, art. 11 par. 1.
Switzerland: BG. (June 5, 1886) 12 BGE. 339, 342, Clunet 1889, 350; (April
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by no means overwhelmingly supported,\textsuperscript{31} rule has been readily adopted by Beale and the Restatement. In two obscurely related sections the Restatement\textsuperscript{32} asserts, regarding "benefits or other enrichment,"\textsuperscript{1133} that the law of the place where a benefit is conferred or unjust enrichment is rendered, determines compensation or repayment. The illustrations show that this means the place of a physical act.

In England, Gutteridge, as the first to take a stand in that country,\textsuperscript{34} has adhered to this view.

Various codifications include this rule in their broader provisions.\textsuperscript{35}

It should be noted that in the few known cases decided by courts, all possible theories usually coincide in the result. But the basis of this idea is obvious. Trying to localize the action of enrichment and missing another purely material attachment to a territory, the authors believed that they were compelled to select the place of the act of enrichment. Territorialism so practiced was naturally attractive to Beale.

A Belgian-French group of writers has argued that restitution of payment of money not due, as based on a "quasi contract,"\textsuperscript{36} or "rather a quasi delict,"\textsuperscript{37} allows a presumption of party intention for an applicable law. This, again, has led to the place where the sum is paid.

(b) Other connections. Many contacts have been con-

\textsuperscript{28, 1900} 26 BGE. II 268, 272; (Nov. 25, 1905) 31 id. II 660, 665; 2 MEILI 86; 2 BROCHER 138; FRITZSCHE, 44 Z. Schweiz. R. (N. F.) (1925) 2432; SAUSER-HALL, id. 2952; 2 SCHNITZER 549.

Código Bustamante, art. 221.
\textsuperscript{31} This is also the conclusion of ESPINOLA, 2 Lei Introd. 534 § 236: "Não existe acôordo"; 3 VICO 128 § 146: "Son diversas las soluciones propuestas. . . ." Otherwise, LIPSTEIN, 7 Cambr. L. J., supra n. 23, at 86 and n. 11.

\textsuperscript{32} Restatement §§ 452, 453.
\textsuperscript{33} Thus 2 BEALE 1429 § 452.1 formulates the common topic of §§ 452, 453.
\textsuperscript{34} Supra n. 23.
\textsuperscript{35} See supra ns. 1 and 2.
\textsuperscript{36} 8 LAURENT 8; WEISS, 4 Traité 415 n. 1.
\textsuperscript{37} DESPAGNET 934 § 321.
sidered such as the nationality common to both parties,\textsuperscript{38} or the nationality\textsuperscript{39} or the domicil\textsuperscript{40} of the defendant, or the place where he has to make restitution of the enrichment,\textsuperscript{41} which is usually both his domicil and the place of enrichment. The \textit{lex fori} has also found an advocate.\textsuperscript{42}

All these haphazard theories have no following. Their feeble justification, however, consists in the grave doubt inherent in the theory under (a), concerning exactly what event should make the alleged territorial contact. It is generally assumed that it is the enrichment of the defendant rather than the impoverishment of the plaintiff which must be localized. But when in a case before the Swiss Federal Tribunal a draft was paid in Paris by mistake of the local cashier\textsuperscript{43} of a certain bank, the enrichment of the defendant, a Swiss bank, must have occurred at his domicil, the center of his assets, and not in Paris as the court assumed. In fact, a subsequent decision of the same Swiss court applies "the law of the place where the enrichment is said to have occurred, hence, as a rule, at the place of the domicil of the acquirer."\textsuperscript{44}

2. Law of the Relationship Causing Enrichment

Should it not be feasible to localize internationally the duty of restitution by contemplating the legal origin of the enrichment, rather than its territorial origin or the vicissi-

\textsuperscript{38} Laurent and Weiss, \textit{supra} n. 34. Rolin, \textit{I} Principes 566 \S 360; Poullet 467; Código Bustamante, art. 221 (common personal law); 2 Pontes de Miranda 184.

\textsuperscript{39} 2 Zitelmann 528.

\textsuperscript{40} Gebhard in Niemeyer, Vorgeschichte 156; Walker 546.

\textsuperscript{41} Germany: RG. (Nov. 8, 1906) 18 Z. int. R. (1908) 159; (July 5, 1910) 74 RGZ. 171; (March 16, 1928) 82 Seuff. Arch. 205 No. 121, IPRspr. 1928, 58 No. 37; (July 7, 1932) IPRspr. 1932 No. 39; 2 Frankenstei n 384, 392; Nussbaum, D. IPR. 294.

\textsuperscript{42} Valéry 970 \S 671; Cour Paris (May 18, 1893) Clunet 1893, 827; App. Alger (May 5, 1896) D. 1899.2.412.

\textsuperscript{43} BG. (April 28, 1900) 26 BGE. II 268.

\textsuperscript{44} BG. (Nov. 25, 1905) 31 BGE. II 662, 665.
tudes of its future development? Despite all the variety in the laws respecting the conditions of a duty of restitution, there is a common pattern. Whatever else motivates a law to recognize a claim for unjust enrichment, the aim is always to disallow on account of some initial or subsequent vice an acquisition duly made in accordance with the formal laws. Following this common idea and neglecting the technical differences by which the systems of law operate, our attention moves back to the various situations that need correction. No mechanically ascertainable contact is adequate for all cases. Choice of law must depend on the nature of the source from which the enrichment stems.

This experience has slowly emerged from frequent though casual observations that all legal obligations cannot be bound to one territorial connection, and gradual awareness that in particular the law governing a frustrated contract should extend to the actions enforcing the return of a performance made on the contract. Niemeyer and Neuner in Germany, and with respect to undue payment Pillet and Arminjon in France, have prepared an appropriate theory, now tentatively but with increasing assurance expressed by the most recent German authors, particularly Martin Wolf, Raape, and Zweigert. Various German decisions have followed the same view. At the same time, the British Law Reform (Frustrated Contracts) Act, 1943, has instinctively chosen an identical method. The new law prescribes restitution of all sums paid in pursuance of a contract discharged by impossibility of performance or other

45 E.g., 2 Arminjon (ed. 2) 335; 10 Répert. 776 No. 2.
46 Niemeyer, Vorschläge und Materialien zur Kodifikation des IPR. (1895) 244; Neuner, 2 Z. ausl. PR. (1928) 122 n. 1.
47 Pillet, 2 Traité 311 § 547a; 2 Arminjon (ed. 2) 338.
48 Gutzwiller 1623; Nussbaum, D. IPR. 295 n. 2; M. Wolff, D. IPR. 104; id., Priv. Int. Law 505 ff. § 481; 2 Streit-Vallindas 267; Raape, 2 D. IPR. 296 f.; Zweigert, supra n. 27.
49 Bay. OblG. (Nov. 16, 1882) 38 Seuff. Arch. 260; RG. (June 18, 1887) 4 Bolze No. 26 (unavailable); and citations of recent decisions below.
frustration, and applies to contracts "governed by English law." The place where the sum is paid, thus, is without importance. Although this deviation from the orthodox criterion has been criticized by some writers, it has been welcomed and extensively interpreted by Falconbridge.\(^{50}\)

Also, the draftsmen of the revised draft of the Montevideo Treaty (art. 43) in 1940, must have felt in a similar way. To the rule that obligations arising without contract are governed by the law of the place where the "licit or illicit fact" occurs, they add the words: "and in an appropriate case, by the law governing the legal relations to which they correspond."

This approach will doubtless be improved by thorough exploration. Here we may briefly contemplate the theoretical ground and a few typical applications.

C. RATIONALE

1. Theoretical Approach

It is generally agreed that the question whether an enrichment is justified must be determined by the law under which its acquisition takes effect.\(^{51}\) It is submitted that the same law governs the action for restitution as a whole.

Suppose a seller has delivered the goods but rescinded the contract because of the buyer's default. This means in American and German laws the destruction of the contract. If he, then, sues for the return of the goods on the theory of unjust enrichment (rather than of ownership), the provisions on enrichment of the legal system governing the contract must apply. It is quite true that the enrichment is


\(^{51}\) GEBHARD in Niemeyer, Vorgeschichte 156 n. 1; PILLET, 2 Traité 311; ROLIN, 3 Principes 62; 2 ZITELMANN 194, 525; NEUMEYER, IPR. (ed. 1) 32; 2 FRANKENSTEIN 392 n. 32.
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unjust only because the contract has ceased to exist. But if it has been therefore objected that it is "illogical" to extend the law of the former contract to its *sequelae*, this is the typical wrong logic by which it has been declared impossible that the formation of a contract should be governed by the law applicable if the contract is valid.

Any comparison of the municipal systems shows that restitution on the ground of failure of consideration is afforded by different technical means, such as a claim of ownership reverting to the seller; a "condictio" or claim for unjust enrichment properly termed; an action intermediate between those for enrichment and breach; or a remedy sounding purely in contract. Even the elaborate German Civil Code has failed to make it clear to what category exactly the action based on recission belongs. It is imperative to subject all of these—merely with certain reservations concerning property—to one conflicts rule. Where ownership is transferred irrespective of the validity of the sales or other contract, as may occur under German law, the absence of the presupposed cause leads to unjust enrichment. Since the transfer was caused by the contract—one might say, was done to satisfy the law of the contract—this law ought to determine what should happen to restore balance. The law of the place of transfer has no importance whatever.

Even when a contract is termed void *ab initio* or by annulment, this is proper juridical language, but it should not be stressed too literally. There may be an aftereffect, such as when damages for fault in contracting or innocent representation are recoverable; without any doubt they are subject to contract rules. There is no obstacle in theory to

52 2 SCHNITZER 549 verbally followed by LIPSTEIN, 7 Cambr. L. J., supra n. 23, 86.
54 See the commentaries to BGB. §§ 327, 348.
applying the law of such a contract to actions for return of performance. The common law doctrine of constructive trust is commonly applied where there is a violation of a fiduciary relationship. The unjust enrichment of the agent should therefore be subjected to the law governing the relationship and not necessarily to that of the place of the enriching act.

That a contractual debtor pays more than he finally is found to owe, is an analogous occurrence. Where a seller delivers more goods than he should and the surplus quantity is finally rejected, ownership may or may not have passed, according to the system and the circumstances. No distinction in this respect can be made in a conflicts rule concerning the obligatory claim. We may, however, even go farther.

A claim for violation of a legal or beneficial property right is commonly regarded in isolation; and therefore, no local contact seems possible other than the lex situs. But the relationship between the parties may not be so simple. A distinct example is the resulting trust at common law; a legal transfer of property in the absence of consideration is understood to create, by a tacit agreement, an obligation to return the beneficial interest therein. Is the lex situs competent to govern this construction or rather the law controlling the transaction of the parties?

Inversely, ownership or any property interest may vanish, leaving an obligation for restitution. Of such nature is innocent conversion at civil law where it is conceived as unjust enrichment rather than as tort. For instance, Justinian—to show himself as the protector of art—ending an old school controversy, adopted the opinion that a table used for painting but belonging to another person, should become the property of the artist who, however, ought to pay the value of the table to the former owner.\(^5\) These are two

\(^5\) Inst. Just. 2, 1, 34, incorporating Gai. Inst. II 78, cf. Gaius, Dig. 41, 1, 9, § 2; Paulus, Dig. 6, 1, 23, § 3.
parts of one solution and cannot be divided between two
laws. The *lex situs*, indispensable for the disposition of
property, hence, must also furnish the rule on enrichment.
If goods have been shipped to Rio de Janeiro and there
delivered to a wrong address, viz., to the local agent of a
New York firm, enrichment is probably deemed to occur in
New York, but Brazilian law must govern. It decides
whether, at what time, and to whom, property passes and
ought also to determine what duty of restitution burdens
the new owner.

2. Historical Reminder

It is a curious observation that juridical elaboration of
our system may tempt us to overestimate the value of the
differentiation of categories brought about by our pro-
fessional development. We should not forget that all direct
and indirect effects of agreement have originated upon one
basis, first of tort, later of contract. The Roman classic
process formula of *actio certae creditae pecuniae* served
for the recovery of a valid loan but, if the contract was
void, for instance, because the borrower was a lunatic, or
because he was in error about the person of the lender,
the same formula was good for the repayment of the enrich-
ment. The same formal writ used for ages in England to
enforce repayment of a loan was employed when the money
given appeared to belong to the plaintiff without a recog-
nized type of contract or tort. The primitive notion that
the lender may claim "my money," recurs to this day. "Debt"
is really detinue, as the Roman *condictio* is based on non-
justified *habere*. Our ineluctable division between property
and obligations is not meant to establish barriers separating
naturally connected problems. Conflicts law must rigorously
strive to avoid this danger.

57 Julianus, Dig. 12, 1, 19, § 1 (despite interpolation); Celsus, Dig. 12,
1, 32.
58 Holsworthy 88, 92.
1. Family Law

A German recognized in Switzerland his paternity of certain children. He sued for revocation of the recognition as unjustly obtained by deceit (BGB. § 812 par. 2). A German court correctly applied Swiss law to this claim. 59

2. Rescission and Avoidance of Contract

(i) A buyer not paying the price has to restore the goods on the request of the seller, because the return is implied in the synallagma, that is, the exchange of price and delivery, essential to sale. Hence, the law governing the sales contract extends to the action for restitution, however it may be legally construed.

(ii) Dissolution of contracts by war. The Treaty of Versailles dissolved contracts between persons having become enemies, with certain exceptions. What became of a partial performance by one party? Judge Algot Bagge as president of a division of the Anglo-German Mixed Arbitral Tribunal ascertained that under German and Scotch laws an action would lie for recovery as unjust enrichment, but that in England under the rule of Chandler v. Webster 60 the acts of performance done before the dissolution were not recoverable. To escape such different results, under the Treaty, Bagge decided that the Treaty must have intended to recognize and maintain a money obligation for restitution every time the parties had not distributed the risks otherwise. 61 Thus he rightly took it for granted that restitution of a performance is essentially connected with the law destroying the basis of the obligation. In several decisions by another Swedish president, a division of the same court turned to the application of the national law of un-

just enrichment, but this, again, was in all cases taken from
the system governing the contract. 62 The same question
of whether a claim for the repayment of advances made in
performance of contracts is implied in the peace treaty
dissolving contracts or to be based on the applicable na­
tional law, has recurred under the obscure texts of the five
peace treaties of 1947. 63

3. Performance Without Just Cause—Upon an Assumed
Pre-existing Obligation

(i) Suppose a legacy left by a testator domiciled in
Argentina to a citizen of New Orleans is paid to him in
New York. The Argentine law of inheritance competent
to state whether a valid legacy obligation exists, is the right
law also to determine the effects of payment in case of
avoidance of the legacy. What import has the place of pay­
ment or the domicil of the receiving person? 64

(ii) Before 1900, A, in a place under Prussian law, hav­
ing bought a house in Brunswick from a vendor domiciled
there, paid more than he owed, by a payment in Magde­
burg, a place under common law. The sale was naturally
governed by the lex situs (Brunswick) and rightly the
Reichsgericht applied the same law to the limitation of
action for the repayment of that which was not due. It
should not have invoked the place of performance, but it
was right in pointing to the connection between the seller’s
duty to repay and his contractual obligations. 65 The place of
payment was immaterial.

(iii) A German company, owner of a German-registered
steamer, created a first mortgage in Dutch currency to a
Dutch firm. The vessel was sold at auction in England, and

62 Anglo-German Mixed Arb. Trib. President Klaestad (July 21, 1926)
Alexander Davidson v. Gebrüder Dammann, 6 Recueil trib. arb. mixtes
588; (Oct. 20, 1926) Arnold and Foster, Ltd. v. J. W. Erkens, 6 id. 606;
6 id. 639; and in 7 id. 372, 375, 379, 418, 493; 8 id. 7, 283.
63 For the first construction, MARTIN, "Private Property etc. in the Paris
Peace Treaties," 24 Brit. Year Book Int. Law 273, 297 n. 6; for the second,
ERNST WOLFF repeatedly, and most recently in his book, Vorkriegsverträge
in Friedensverträgen (1949) 101.
64 RAAPE, D. IPR. 296 (2) b.
65 RG. (July 5, 1910) 74 RGZ. 171.
the Dutch mortgagee—under an English rule deemed to be substantive—received the amount of the mortgage by conversion of the guilders into pounds according to the exchange rate of the day of the creation of the mortgage. The Hamburg Appeal Court stated that the loan and mortgage contract expressly stipulated for German law and as this law included a rule for conversion according to the date of payment, it extended to the claim for unjust enrichment to recover whatever excess had been paid in England.\[66\]

4. Without an Assumed Pre-existing Obligation

(i) A German firm assigned all its claims, arising from sales to Dutch customers, to a German bank for security of credit, but subsequently assigned one of the Dutch drafts involved to another German firm. The first assignee obtained restitution from the second under a German rule applicable, as the court said, under all conflicts theories concerning enrichment.\[67\] But the decision could not have been different, if the second assignee had received the draft by indorsement in Holland or had cashed it there. Nor is the circumstance that both assignees were nationals and domiciliaries of Germany of any significance. The real reason for acknowledging the right of the plaintiff was the priority of his claim against the debtor (according to the law of the assignor's domicil)\[68\] effective in the field of enrichment even after he lost the claim.

(ii) If a surety has entered into his obligation without agreement with the principal debtor and by payment is not subrogated in the principal debt, he may have a claim on the ground of unjust enrichment against the debtor—according to what law? The traditional opinions point to the places either where the surety paid or wherever he could pay, or where the debtor is enriched by liberation, probably at his domicil.\[69\] But as generally in suretyship matters, it is de-

\[66\] OLG. Hamburg (May 15, 1929) Hans. RGZ. 1929 B No. 227, IPRspr. 1929, 74 No. 51.

\[67\] RG. (July 7, 1932) IPRspr. 1932 No. 39, cf. BGB. § 816 par. 2. Cf. an analogous case of wrong delivery of a cargo, OLG. Hamburg (July 1, 1932) id. No. 40.

\[68\] Infra Ch. 49.

\[69\] Thus Fedozzi-Cereti 764.
sirable to apply the law under which the surety is liable, which wherever feasible\textsuperscript{70} is to be identified with the law of the principal debt.

III. General Average

From ancient times the sacrifice of goods carried on the seas in order to save other goods and particularly the vessel has produced rules for equitable distribution of the loss. The underlying idea is at present regarded as the community of risk involved in a sea carriage rather than unjust enrichment\textsuperscript{71}. A common legal history has not prevented, however, a great many differences of regulations, accompanied by a chaos of conflicts rules. Unification was therefore early sought by the International Law Association at the Congresses of York, 1864, and Antwerp, 1877, with the resulting rules, reformed at Stockholm, 1924.\textsuperscript{72} These "York-Antwerp Rules" have obtained almost universal force by insertion or reference in bills of lading and contracts of affreightment. Such a clause may run as in the Argentine governmental form: General average is subject to the York-Antwerp Rules, 1924, and insofar as these do not decide, to the Argentine Commercial Code and usage. The place of the adjustment will be Buenos Aires and the carrier will appoint the adjuster or adjusters.\textsuperscript{73}

Unfortunately, some forms still refer to the older draft of the Rules, and even the rules of 1924, though more com-

\textsuperscript{70} Supra Ch. 47, III, i, p. 352.

\textsuperscript{71} L. Mossa, 2 Derecho mercantil (1940) 549 (Spanish ed. of Diritto commerciale) and cited authors.

\textsuperscript{72} Reports of the 33rd Conference (1925) 670 ff.; Benedict, 6 American Admiralty 334; Crouvès, 2 Répert. 269 ff. Revision of the Convention was begun at the Conference of the Comité Maritime in Antwerp, on September 24, 1947.

\textsuperscript{73} Rep. Argentina, Ministerio de Marina, Admin. Gen. de la Flota Mercante del Estado, s. 34, printed in Malvagni, Curso de derecho de la navegación (1946) (Pocket Ann.). For analogous clauses recommended in the United States, see Benedict, 6 American Admiralty 346; Knaust, Ocean Bills of Lading (ed. 3) 253.
complete, have left gaps and are not used for every carriage. Hence there is still great force in the age-old principle that the adjustment of the claims should be made at the port of destination, or in case the voyage cannot be carried to its end, the port of refuge where ship and goods are separated.⁷⁴ Some formulations use less distinctive indications, such as the Portuguese Code referring to the port “where the goods will be delivered.”⁷⁵

Many writers have attacked this very old practice and favored the law of the flag or the law of the contract.⁷⁶ Their arguments are rather deceptive. Nor is the customary rule to be explained as *lex loci solutionis* or on some other theory. It is simply the practical need that points to the

⁷⁴ United States: Charter Shipping Co. v. Bowring, Jones & Tidy (1930) 281 U. S. 515; and cases cited by 2 Beale 1332 § 411.2; 2 Wharton 962.


France: Ripert, 3 Droit Marit. 219 §§ 2227 ff., Crouves, 2 Répert. 287 No. 88.

Germany: Wagner, Seerecht 142; Schaps, Seerecht § 700 No. 30 and n. 2.


Italy: Former practice, see Scerni 278.

The Netherlands: C. Com. arts. 722, 723, 745 (distinguishing several cases); H. R. (June 22, 1928) 22 Revue Dor 434.


Portugal: C. Com. art. 650.

Spain: C. Com. art. 847 par. 2.

Brazil: Sup. Trib. (Sept. 10, 1926) 82 Rev. Dir. 111; (April 27, 1927) 85 id. 460.

Guatemala: C. Com. art. 961; Matos 561 § 402.

Treaty of Montevideo on Int. Com. Navig. (1940) art. 17 (excepting the formalities and conditions of the stipulation on average reserved for the law of the flag, in accordance with the restriction on *locus regit actum*, see Gowland, Report in República Argentina, Segundo Congreso Sudamericano at 303.

⁷⁵ Portugal: C. Com. art. 650. Often “port de reste” and “port de destination” are used synonymously, which is confusing.

⁷⁶ Survey of laws and literature in Crouves, 2 Répert. 265 ff.; Note, 22 Revue Dor 461; cf. 2 Bar 2212; Meili 369; Lyon-Caen, Clunet 1882, 593; Eynard 180; Inst. Droit Internat., 8 Annuaire (1886) 124; 6 Lyon-Caen et Renault § 983; Despagnet 930; Bonnecase, Dr. Com. Mar. 700 § 791.

Montevideo Treaty on Int. Commercial Law (1889) art. 21 (reversed by the text of 1940); Código Bustamante, art. 288.
place where the last remaining goods are discharged. As an English judge said in 1824: "The place at which the average shall be adjusted . . . is the place of the ship's destination or delivery of her cargo," and the shipper of goods "by assenting to general average, must be understood to consent also to its adjustment, according to the usage and law of the place at which the adjustment is to be made." The adjuster is not expected to study the laws of all the parties concerned, nor is there a reason why the law of the vessel which is a party to the community of interests, should be preferred to the other laws. The persons primarily interested are the consignees and the insurers.

The binding force of foreign adjustment, undoubted as to the coadventurers, has been subject to certain questions with regard to the underwriters. But legal provisions and the revised clauses of the insurance policies have taken care of the doubts.

The scope of the local law of the port is not always easy to trace. English and American discussions seem to be missing. In the Continental literature, the doubts have been increased by the frequent claim that the law of the flag should control, if not the whole matter, at least special problems. Of course, the law of the flag may adequately determine whether the master has to consult the crew before sacrificing goods, and in what cases he obligates the shipowner. But the relation between the shipowner and the cargo owners is the subject of the carriage contract, complemented by usages.

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77 Excellent, Note, 22 Revue Dor at 465. See also MONACO, Studi per la codificazione (1940) 142.


79 For a comprehensive discussion, see ARNOULD, On Marine Insurance and Average (ed. 12, 1939) §§ 994 ff.


81 Germany: OLG. Hamburg (June 12, 1922) Hans. RGZ. 1922 No. 175, 78 Seuff. Arch. No. 96, approving SCHAPS, Seerecht § 700 n. 29; Note, 22 Revue Dor at 468.
Other questions discussed are: the meaning of maritime voyage in the average doctrine; who ought to contribute and to what extent (if not covered by the York-Antwerp Rules); and whether the obligation of the ship owner is personal or only *ad rem*.

The German courts apparently resort indiscriminately to the law of the port of destination, applied by them to affreightment. All other courts, in the true meaning of the tradition, look to the law applied by the adjuster. His conclusions are internationally respected, provided—and this should never be forgotten—that they are vested with the judicial authority of the country where the port lies. Thus, the Dutch courts, construing their new code provisions as the consecration of the universal custom, have recognized that a Swedish adjustment following the local law, had authority not only as respects the damage and the amounts assessed, but also in determining the parties liable. 82