CHAPTER 3

The Development of Conflicts Law

I. RETARDING FACTORS

1. Preconceptions

It is gratifying that the majority of writers now advocate emancipation from deductive methods.\(^1\) Past theories have left remainders too persistent, however, not to cause mischief. As a matter of course, and without reference to the desirability of doing so, the doctrine of territorialism has allocated broad fields to the law of the forum, including that of divorce and support, which is to be discussed in the present volume. There is still reluctance to attribute full legal effect to foreign acts and judgments in cases where the original power or jurisdiction of the foreign state is freely admitted, as is shown in the treatment of foreign adoption and foreign corporations.

Moreover, foreign law, though “applicable” under the appropriate conflicts rule, may nevertheless be rejected on the ground of “public policy” of the forum. Due formerly to the jealousy of small communities and princes, recently to chauvinism and worship of the state, this ground has abnormal significance.\(^2\) Though for a long time French courts were

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\(^1\) See in particular Arminjon, “L'objet et la méthode du droit international privé,” 21 Recueil 1928 I 433, against deductive and for analytical method; Lorenzen, “Developments in the Conflict of Laws,” 40 Mich. L. Rev. (1942) 781 at 805, “There is some indication that our courts are prepared to adopt a somewhat more realistic approach in conflicts situations. The immediate hopes for the further development of the conflict of laws in this country would seem to be in this direction.”

\(^2\) Justus Wilhelm Hedemann, former democrat, wrote in Dt. Justiz 1939, 1523: “Slowly the so-called private international law will take another aspect.
generally attacked because of their exaggeration of ordre public, European writers now tend to outdo them.

The increase of national feeling in Europe in the midst of the nineteenth century engendered Mancini's famous doctrine of nationality. The "principle of nationality," administered on a world-wide scale as Mancini insisted, would have been able to establish a balance in matters of personal status. But, excluded from the Anglo-American realm and from other countries, it created confusion on account of the claim of European states to govern the status and capacity of subjects who had emigrated to such countries. Moreover, as we shall see, the principle was repeatedly interpreted without sense of responsibility and reciprocity.

The doctrinal arguments generally adduced against such practical necessities as "renvoi" and the right of the parties to a contract to determine the applicable law are so significant that these two institutions deserve preliminary discussion immediately hereafter. Both have been rejected as incompatible with state sovereignty! The power of parties to choose their law by agreement was even declared "impossible," because there had to be first a substantive law allowing them such choice!

In a similar misuse of logic, it has been declared that the law governing the effects of a contract cannot "logically" control the extent to which error, fraud, or duress affects the consent of the parties—there must be a law to determine the validity of the transaction, before the law governing its effects can be selected. The law of the state of incorporation,

It might be that the general clauses concerning public policy and reprisals (articles 30 and 31 of the Introductory Law) will overshadow everything else of the private international law." In the first World War, the Reichsgericht upheld firmly the conflicts rules, and the government in no serious respect interfered.

8 See on the following examples, RABEL, "Die Deutsche Rechtsprechung in einzelnen Lehren des internationalen Privatrechts, Vorbemerkung," 3 Z.ausl. PR. (1929) 752; WAHL, ibid. 791; KESSLER, ibid. 768.
or other law regulating the life of a corporation, has been said to be unable "logically" to determine the conditions of valid constitution of the corporation. The settled rule that the law governing torts decides whether or not an act is a tort has been characterized as a "legal impossibility." Remembering the deduction of the clever Romanist, Mühlenbruch, that assignment of a chose in action is logically inadmissible, and similar errors of eminent jurists, we may derive consolation from the thought that time will provide a remedy.

In the United States, courts and writers are cognizant of such handicaps and are endeavoring to overcome them. Tradition and modernism are engaged in an interesting combat with varying results. Circumstances differ in the parts of this vast country. In respect to certain problems, it is difficult to state what American law actually is, as the Restaters have come to suspect. But the writers, practically without exception, and the great majority of the courts are seriously conscious of their duty to reach adequate solutions. When handbooks and notes in law reviews report on a subject, they usually present the forward trend of advanced courts in preference to formalistic decisions and precedents exaggerating local policy.

2. Renvoi

The controversy on "renvoi" is the most famous dispute in conflicts law, a classic example of violently prejudiced

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4 This was the expression of 2 Frankenstei 363.
6 Bibliography is to be found in PoTu, La question du renvoi en droit international privé (1913); up to 1929 in Lewald, "La théorie du renvoi," 29 Recueil 1929 IV 519; and in the footnotes by Maury, "Règles générales des conflits de lois," 57 Recueil 1936 III 519 ff. On the history of the problem since a French case of 1652 see E. M. Meijers, "La question du renvoi," 38 Bull. Inst. Int. (1938) 191, 197.
literature confronting naively consistent practice. Only where courts finally succumbed to the persuasion of world-wide learned criticism, did they falter, as in Greece, Italy, and in


In continental Europe besides the notes mentioned infra n. 7, PAGENSTECKER, Der Grundsatz des Entscheidungseinklangs im internationalen Privatrecht (Akademie der Wissenschaften und der Literatur in Mainz, Abhandlungen der geistes- und sozialwissenschaftlichen Klasse, 1951, no. 5) is noteworthy.
the isolated and now superseded *Tallmadge* case in New York. On the other hand, the constancy of the French, German, and Swiss courts has been sufficient to impress their foremost Italian opponent, Anzilotti, and recently their main French adversary, Niboyet.

In the course of the debate, many wrong arguments, "logical" and "practical," were advanced on either side. Most of these have cancelled each other long since. According to the view shared by the writer and gaining favor in this country, the entire problem is not to be taken in the lump and decided on *a priori* reasoning. The various categories of cases merit individual consideration in the light of expediency. Hence, in the subsequent treatment of each particular subject, the prevailing opinions, and the chief countries con-

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8 Anzilotti, formerly against renvoi, Studi critici di diritto internazionale privato, parte 3, 193, 300, elaborated a system approaching the ideas of the English judges, Corso di diritto internazionale privato (1925) 66, 77; Decision Notes, 12 Revista (1918) 81, 288.

9 Niboyet, Decision Note, Revue Crit. 1939, 474–476 and 3 Traité no. 1013–1016, now accepts renvoi as definitely adopted by the courts, moreover as convenient, but in addition also as a tribute to territorialism.


11 Griswold, 51 Harv. L. Rev. (1937), 1165 at 1184, *supra* n. 6. See also RaaPe, IPR. 65; Lerebours-Pigeonnière (ed. 3) no. 260.
cerned, will be stated. Here we have to deal only with the basic issue.\textsuperscript{12}

Renvoi, translated as "remitting," "reference back," properly means that, when a conflicts rule of a state refers to the "law" of another state and the conflicts rule of the latter state directs the application of the former's own internal law, such law is applied. Thus, in a French court, succession upon death to the movables of an American citizen domiciled in France is governed by the "American law" but, the law of the domicil, i.e., French inheritance law, being applicable under American principles of conflicts, this law is applied by the French courts.

When the principle of renvoi was first adopted in the Forgo case by the French Court of Cassation,\textsuperscript{13} the avowed motive was favor of the law of the forum, the law familiar to the judge and appearing to him the most suitable. In that case, moreover, the French state had a material interest. The judgment gave the property of a deceased Bavarian citizen in the absence of heirs to the French exchequer rather than to that of Bavaria. This narrow-mindedness is responsible for much of the ensuing heated attacks on the doctrine. Nevertheless, many courts applying renvoi exhibit a similar attitude, and some writers, as well as a few projects, recognize only the reference back to the law of the forum, in contrast to other forms of reference.\textsuperscript{14} However, renvoi ought not to

\textsuperscript{12}The policy considerations involved in the following exposition were indicated by the present writer in "El fomento internacional del derecho privado," 18 Revista Der. Priv. (1931) 367; RABEL, 5 Z.ausl.PR. (1931) 281; RABEL, 7 ibid. (1933) 199 n. 1; RABEL, Die Fachgebiete 118; they are in essential agreement with the opinions of MELCHIOR and GRISWOLD, fundamental for German and American laws, respectively.

\textsuperscript{13}Cass. (req.) (Feb. 22, 1882) Clunet 1883, 64; moreover, confirming the doctrine, Cass. (req.) (March 1, 1910) Clunet 1910, 888, the vote of the Counsellor Denis, published in Clunet 1912, 1013, declared: "J'aime mieux la loi française que la loi étrangère."

\textsuperscript{14}STAUB, Kommentar zum Handelsgesetzbuch, Anhang zu § 372 no. 5 (a); HÖLDER, 19 Z.int.R. (1909) 198; NUSSBAUM, Principles 99.

The drafts of the new Italian preliminary provisions allowed only reference
be understood as a concession to judicial deficiencies or prejudices. It represents the idea that a rule of conflicts of country X, referring to the law of country Y, should not be pursued to the point where the court in X applies to an inheritance the law of Y, and a court in Y the law of X. Except under the influence of the learned literature, no normal judge would approve such a result. The theoretical accoutrements for this feeling have finally been furnished by a few modern writers. Reasonable interpretation of conflicts rules, often, if not normally, restricts the application of foreign substantive rules of law to the territorial limits defined by the respective foreign legal systems in their conflicts laws. Hence, the reference to the “law” of a foreign state may mean selection of the specific internal law that such state itself applies, and even an express reference to the internal law of a state may be conditional on its applicability by the state in question to the particular case.

The opposite opinion, generally prevailing until recently, takes it for granted that a sound conflicts rule must necessarily refer to the material rules of some country and not leave the ultimate issue to foreign conflicts law. Why? One argument asserts that it is unworthy of a sovereign state to follow the commands of a foreign state. It appears that Italy, influenced by the intended universal significance of the Italian conflicts rules, has been won over by this argument.

back and have been justly criticized as inconsistent by Aco, “Le norme di diritto internazionale privato nel progetto di codice civile,” 23 Rivista (1931) 297 at 349, 350.
In Soviet Russia, reference back is considered to agree with the spirit of the law; see Makarov, Précis 123; but Lunz 129 also recognizes reference over.
15 Melchior 242–244.
16 Raape 741 and Raape, IPR. (ed. 1) 42.
17 The argument was invented in France: Labbé, Clunet 1885, 5 at 9; Valéry 486 nos. 372, 374; Pillet, Traité 532; Bartin, Principes 205, and many others.
18 See Melchior 200; cf. 241. An entire book against the doctrine of the Italian courts has been published by Philonenko, La théorie du renvoi en droit comparé (Paris, 1935).
It seems most curious that Italy's dignity should be offended when Italian courts apply the Italian Civil Code instead of English case law. Another, the most popular argument, states that renvoi leads to a vicious circle. If the "acceptance" of renvoi from the (American) country of nationality to the (French) law of domicil is right, dominant opinion reasons, the same method must continue with renvoi from the French law of domicil to the American law of nationality. "Logical mirror," "international lawn tennis," "ping-pong," are celebrated names of the supposed *circulus inextricabilis,* time and again designated as the "most powerful argument" for rejecting renvoi. By parity of reasoning, it has been supposed that an English or American court resorting to renvoi ought to accept renvoi from the French law of domicil to the American law of nationality, and so forth.

A striking, though tacit, answer has been provided by the English practice, more than a hundred years in development, in the very field where renvoi originated, viz., where nationality and domicil principles conflict. The practice enables the English courts to obtain results in harmony with the Continental decisions in specific situations and to avoid the *circulus.* Basically, confronted with the French and German renvoi practice, the English courts simply have given free play to their own principle of domicil. The estate of an English decedent domiciled in France is distributed under French law, both in French courts by renvoi and in English courts as the

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19 KAHN, 1 Abhandl. 20; LAINÉ, Clunet 1896, 241 at 257, 481; BARTIN, 30 Revue Dr. Int. (Bruxelles) (1898) 155; STREIT, 20 Recueil 1927 V 101; LEWALD 17 no. 22; *In re* Tallmadge, *In re* Chadwick's Will (Surrogate's Court, New York County, October, 1919) 109 N. Y. Misc. 696, 181 N. Y. Supp. 336.

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law of domicil. Put to the test when Italian courts repudiated renvoi, disdained to apply Italian inheritance law, and insisted on British law for British successions in Italy, the English judges exhibited real wisdom in avoiding the absurd result not of renvoi but of the rejection of renvoi. They realized that the traditional form of their domiciliary principle refers to the same law which is applied by the court of the domicil. 21 Under the principle as now defined, the reference to the law of domicil points primarily to the conflicts law of the domicil. The cases use different language to express this policy of forbearance. Undue attention has been given to inconsistencies and to sayings such as that the English court should decide as if sitting at the place of the domicil. 22

In fact, several modes of stating renvoi are thinkable and have been employed by writers, courts on the Continent, and British judges. Falconbridge lucidly distinguishes three formulations of renvoi, 23 and some authors, who have contrived an intricate system of distinctions, call the English method "double renvoi." But these details do not touch the essential point, namely, the policy behind the cases. The writers who seem not to have understood this policy—unfortunately there are many—may be excused, since even Luxmoore, J.,

21 In re Ross, 1 Ch. D. [1930] 377, 388.
22 Collier v. Rivaz, 2 Curt. Ecc. Ct. (1841) 855, 863, per Jenner, J., often quoted, and adopted by Dicey in his early thesis that "the object of our courts is to deal with such a will exactly as the courts of the domicil would deal with it." Dicey, The Law of Domicile, as a Branch of the Law of England (London, 1879) 295.

The differences of language and certain errors in the decisions were subjected to a meticulous criticism by Mendelssohn-Bartoldy, Renvoi in Modern English Law, followed widely by Cheshire 62–87, in an unfortunate contrast to his former view, "Private International Law," 51 Law Q. Rev. (1935) 76 at 77, (Cheshire, ed. 1, 135–139). Both authors, in the spell of the formalistic international theories, failed to appreciate sufficiently the policy questions. The same is true of the subtle criticism by Morris, 18 Brit. Year Book Int. Law (1937) at 32, supra n. 6, now also Dicey—Morris 47–61. See Griswold, 51 Harv. L. Rev. (1938) at 1172, supra n. 6, and his Book Review, 51 Harv. L. Rev. (1938) 573.

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in In re Ross 24 and Lord Maugham, in In re Askew,25 while confirming and fortifying the rule, evidently regretted that the precedents had abandoned the pure domiciliary test. The English rule is a praiseworthy contribution to international harmony, not difficult to derive from the principle of domicil. It was prepared by the historic doctrine that jurisdiction implies application of the law of the court.26 Finally, these principles have been illuminated by the Privy Council in a recent case 27 "with all the weight of a considered judgment devoted to the issue" of renvoi in general.28 The reference from the lex situs to the national law in the Palestinian Succession Ordinance, 1923, of a deceased owner is construed as pointing to the law which the courts of the national country would apply to the property in question, as distinguished from property in their own country, the contrary construction being regarded as "deliberately cutting across the principle" 29 recognized by the English courts.

What, then, of the mirror cabinet? If the world is split into two contradictory systems, there must be some modus vivendi. Renvoi is one of the best means to this end. It stands to reason that it cannot be applied in the same manner by the two antagonistic groups and at the same time reach conform-

26 See the interesting discussion by Morris, 18 Brit. Year Book Int. Law (1937) at 32, supra n. 6; Rheinstein, 12 Annuario Dir. Comp. (1937) 315 ff.; Kuhn, Comp. Com. 52; De Nova, "Considerazioni sul rinvio in diritto inglese," 30 Rivista 1938, 388 at 412-415.
27 Jaber Elias Kotia v. Katr Bint Jiryes Nahas [1941] 3 All E.R. 20, per Clauson, L. J., the Judicial Committee (including Lords Atkin, Russel of Killowen, Romer and Sir George Rankin).
The English method, in turn, is not to be observed by courts following the nationality principle! Theorists should not demand schematic symmetry just to obtain an *argumentum ad absurdum*. This understood, it need no longer be feared that the English attitude will create new cases of *circulus inextricabilis*. The difference between nationality and domicil as tests of personal law requires a different technique in each group of countries. Indeed, the nationality principle does not mean that a foreign national is subject necessarily to the substantive law of his country; it means that the state to which the individual belongs should determine his personal relations. The law of domicil does not mean that everybody must be subject to the substantive law of his domicil. The reasonable construction is that the law of the place of domicil determines what law should govern.

80 The view of the English courts has a striking parallel in an equally wise old decision of the Appeal Court of Lübeck, of March 21, 1861, Krebs v. Rosalino, 14 Seuff. Arch. 644 no. 107. The case was entirely analogous to the Annesley case [1926] Ch. 692. The testatrix, a subject of Frankfurt on the Main, according to the normal concept of domicil, had her last domicil in Mainz, but, as she did not have the governmental authorization for domicil according to the French Civil Code in force in Mainz, she lacked domicil there in the meaning of the law of Mainz, quite as Mrs. Annesley did under French law. The conflicts rule of Mainz was uncertain; possibly it subjected succession to movables to the law of nationality of the deceased, i.e., the statute of Frankfurt. The Court of Lübeck, under its own conflicts rule, referring the succession to the domicil of the de cuius, declared that correct application of the principle required that the entire law of the testator's domicil in its totality be applied and succession upon death be adjudicated as in the courts of the domicil.

In his recent work, LEWALD, *Règles générales des conflits de lois* (1941) 49, 56, again insists that thus the Court of Lübeck refers from domicil to nationality, while the Forno case and all its followers refer from nationality to domicil. But why should this contrast which involves no contradiction, be cited as a reproach to the renvoi principle, rather than to the diversity of conflicts principles and of concepts of domicil?

Instead of following writers who with a certain pride declare that they intend to "explain away" the English conception of renvoi, the English model should be extended to other types of cases and to other countries in accordance with the spirit of the principles guiding the forum.

As to such types of cases, the German courts have consistently assumed that reference back must be accompanied by the acceptance of reference to a third law (Weiterverweisung, transmission). In the case of an English testator domiciled in Germany who leaves immovables in Georgia (U.S.A.), the German rule refers to English conflicts law which refers to the lex situs. The statute of distribution of Georgia, therefore, is applicable in a German court as well as in England, although German conflicts law itself does not distinguish immovables for the purpose of succession. The persistent objections to this extension of the renvoi principle chiefly tend to demonstrate that the chain of references may lead nowhere, a fear not justified by any noteworthy case material and not significant in view of the standard set by the English precedents. There must always be some hierarchy in the applicable laws. Renvoi is not just an aimless game.

Illustrations: (a) A Danish national dies domiciled in Rome, Italy, leaving movables in Germany. A German court will consult the national "law," i.e., the Danish conflicts law,

32 Morris, Mendelsohn-Bartholdy, Cheshire and others.
35 See Nussbaum, 42 Col. L. Rev. (1942) 202, supra n. 31.
36 The first example is solved by Melchior 225 § 151, as in the text, while Wolff, IPR. (ed. 1) 50 (2), uses the first and third examples in order to show that renvoi to a third law should not be followed, if the two foreign laws involved disagree in the choice of law. The case on which they agree is often excepted from the doctrinal refusal of renvoi.
which refers to the domicil and allegedly does not recognize renvoi. Therefore, the Italian statute of distribution is applied. It does not matter that Italian conflicts law equally refuses renvoi so that an Italian court under its nationality principle would apply the Danish inheritance law. Hence a German judge can without difficulty apply \textit{Weiterverweisung} in this case, although the two foreign conflicts laws involved, the Danish and the Italian, do not agree with each other.

(b) A United States citizen domiciled in Rome leaves at death movables in Poland. The inheritance law of Italy is not applicable in any one of the three countries. An Italian court would apply "American"\textsuperscript{37} inheritance law. An American court, were it to adopt the English renvoi practice, would give effect to the inheritance law of an American state. A Polish court, on the basis of the nationality principle and renvoi, should reach the same result.

(c) An Argentinian domiciled in Rio de Janeiro dies leaving movables in France. The French court is referred by its conflicts rule to the Argentine principle of domicil, and thereby to the conflicts rule of Brazil. Until recently, Brazilian conflicts law "accepted" the Argentine "renvoi," and Brazilian inheritance law was applicable in Buenos Aires as well as in Rio de Janeiro.

The present Brazilian Introductory Law of 1942, adopting the domicil principle, leads to the same result. The circumstance that the two internal laws are not in disaccord is not material in a French court, which simply follows the decision that the national (Argentine) court would render.

In the only decision on renvoi since the five former highest tribunals of Italy were replaced by the present Supreme Court, the advantages of "transmission" or reference over, as distinguished from reference back, are recognized.\textsuperscript{38} This case, decided in 1937, is regarded as spectacular, since it is contrary to the settled practice of other courts, to the great majority of writers, as well as to the formal prohibition of

\textsuperscript{37} Which state's law? See infra pp. 138 ff.

\textsuperscript{38} Cass. Ital. (Dec. 29, 1937) 9 Rivista Dir. Priv. (1939) II 228.
renvoi expressed in the new Italian Code, then soon to enter into force.\textsuperscript{39}

While some authors accept only reference back\textsuperscript{40} and others solely reference over,\textsuperscript{41} an increasing number advocate renvoi in either form for situations in which the same law is indicated by the conflicts rules of two or more foreign countries principally involved.\textsuperscript{42} For instance, in case two Swiss nationals, uncle and niece, whose intermarriage is prohibited by Swiss law, were to marry in Soviet Russia while there domiciled, the marriage would be valid according to both Russian law and Swiss conflicts law.\textsuperscript{43} Presumably, it is admitted, the validity of the marriage would be recognized by any court.\textsuperscript{44} Again, by the admission, the existence of a pre-conception is at least partially avowed.

In addition to references from the national law to the domiciliary law, others from the law of situs to the national or domiciliary law and \textit{vice versa}, and in the field of obligations, have been admitted with good justification. The particular situations need separate consideration.

Ordinary renvoi is not able to settle a "positive" conflict of conflicts rules. Where a Spaniard dies domiciled in the United States, his movables are distributed here under the statute of the domicil and in Spain under Spanish inheritance law. This thorny problem is best covered by bilateral treaties. Or it may be obviated by extraordinary concessions, as in the Swiss statute on conflicts. In an admirable effort to avoid collisions regarding Swiss nationals abroad, the statute

\textsuperscript{39} See Grassetti, Note to the decision \textit{supra} n. 38.

\textsuperscript{40} See \textit{supra} n. 14.

\textsuperscript{41} The sovereignty of the forum is said not to be involved; Bate, Notes on the Doctrine of Renvoi (1904) 112 ff.; also, Austrian OGH. (May 2, 1929) JW. 1931, 166 (for obscure reasons).

\textsuperscript{42} Lewald, 29 Recueil 1929 IV 519 at 574; Maury, 57 Recueil 1936 III 329 at 549; M. Wolff, IPR. 76.

\textsuperscript{43} Example adduced by Raape, 24, 745, as support for renvoi in general.

\textsuperscript{44} Lewald, Règles générales des conflits de lois (1941) 58.
provides that Swiss citizens should be subject to Swiss municipal law only if the local domestic law of the domicil does not claim to govern.\(^45\) Hence, the national law extends to Swiss nationals abroad only under a negative condition.

At present, renvoi is prescribed by statutory provisions in Germany, Austria, Poland, Sweden, Finland, China, Japan, Siam, Liechtenstein, and Israel,\(^46\) moreover by the Hague Convention on Marriage,\(^47\) and the Geneva conventions concerning negotiable instruments.\(^48\) In practice, it occurs beyond the limits of these provisions\(^49\) and in other countries.\(^50\)

\(^{45}\) NAG. arts. 28, 31. Compare also the German EG. art. 28, the Polish law on international private law of 1926, arts. 16, 19 par. 3, and the Czecho-slovakian law on private international law of 1948, ss. 17, 23. But the Federal Tribunal has restricted the scope of this concession by excluding the cases where the conflicts rule of the foreign domicil either remits the case to a third state's law (BG. April 3, 1952, 78 BGE. II 200, 203) or declares itself applicable but by virtue of a conflicts rule differing from the Swiss rule (e.g., by subjecting an illegitimate child's support claim to the personal law of the unwed mother where Switzerland applies the Swiss father's personal law, BG. Feb. 2, 1955, 81 BGE. II 17, 20).

\(^{46}\) Germany: EG. art. 27, in five cases of status questions.

\(^{47}\) Art. 1. Member states, supra p. 30, n. 70, art. 46.

\(^{48}\) Resolutions of the Hague (1912) concerning checks, art. 32, similar provision in Soviet Russia: Law on checks, of Nov. 6, 1929, art. 36. Cf. Makarov, Précis 191. Geneva conflicts rules on bills of exchange (1930) art. 2 par. 1 and on checks (1931), art. 2 par. 1. These rules are not only binding between the contracting parties (supra p. 38), but have been enacted by several countries as internal law, see Makarov, Quellen (Index).

\(^{49}\) The German Supreme Court especially applies the principle of renvoi to all matters of conflicts laws. See Melchior § 139.

\(^{50}\) Melchior 198, mentions Argentina (contra: Vico no. 304 and art. 20 of the Draft Civil Code, 82 Clunet (1955) 232), Brazil (but see note 52
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Under the influence of the theoretical literature, the recent codes of Italy, Greece, Egypt, and Syria have rejected renvoi, as does the Brazilian law of 1942, while at the same time reducing conflicts by its acceptance of the domiciliary principle. But in the Continental literature, the traditional hostility of the writers is being abandoned. In 1932, the Institute of International Law, which had censured renvoi in 1895, 1898, and 1900, recognized the conventional, legislative, and judicial trend, manifesting itself in various countries in certain applications of the renvoi doctrine, particularly with respect to personal status.

A like change of mind is to be hoped for the United States. The usual case for resort to renvoi is here almost without

 infra), Belgium (decisions in DE Vos, 2 Problème no. 821), Bulgaria, Luxembourg, Norway, Portugal (also the Draft Civil Code, arts. 30, 31) Spain (cf. W. GOELDSCHMIDT, 15 Z.uasl.PR. (1949/50) 342, supra n. 29), Rumania (supra n. 46), and Venezuela. To be added are certainly Switzerland (SCHNITZER 205), Lebanon (Cass. Dec. 26, 1951, 43 Revue Crit. (1954) 364 with note GANNAGÉ) and probably many other countries. See also Anglo-German Mixed Tribunals (May 31, 1926) 6 Recueil des décisions des tribunaux arbitraux mixtes 540.

Greek C. C. (1940) art. 32.
Egyptian C. C. (1948) art. 27.
Syrian C. C. (1949) art. 29.
The Dutch decisions prevalingly reject renvoi (VAN BRAKEL, 75 n. 1).
The Benelux-Draft on uniform conflict of laws, supra p. 39, though in principle not accepting renvoi (art. 1, par. 1) admits both reference back and reference over from the national law of a person to the law of his domicile (art. 15, no. 2 and 3).

52 Brazil, Lei de Introdução, of Sept. 4, 1942, art. 16.

53 France: in addition to older writers (WEISS, VAREILLES-SOMMIÈRE, COLIN), LEBEOURS-PIGEONNIÈRE, ‘‘Observations sur la question du renvoi,’’ 51 Clunet 1924, 877 and now Précis no. 259; ARMIGNON, ‘‘Le renvoi,’’ Revue 1922-1923, 565 at 583 ff. and now 1 Précis no. 194; NIBOYET, 3 Traité no. 1013-1016.
Belgium: ROLIN, POULLET no. 256.
Germany: NUSBAUM (D. IPR. 51) M. WOLFF (IPR. 76), RAAPF (IPR. 64), in addition to the older writers recorded by MELCHIOR 201 § 137.
Switzerland: SCHNITZER 198; NIEDERER 274.
Italy: ANZILOTTI.
Spain: TRIAS DE BES, ‘‘Règles générales des conflits de lois,’’ 62 Recueil 1937 IV 62; GOELDSCHMIDT, 1 Sistema 377.

54 Annuaire 1932, 471.
significance, as, in common with almost the entire British Empire, none of the States accept the principle of nationality. This evidently is the reason why the basic need has not been felt as in Europe. Other conflicts, however, have occurred, striking enough to compel the Restaters to admit some exceptions to their rejection of renvoi. 55 Cowan proves that renvoi is "logically" possible, 56 and Griswold vigorously pleads for renvoi wherever no special reasons militate against it. 57 Even from an opposed point of view, Cormack, in effect, accepts the practical result of renvoi in all cases respecting status and property, since he would determine these matters according to the law considered applicable at the domicile or situs respectively. 58 It would accordingly seem that the critic who declared his appreciation for Griswold's advocacy of a cause lost before the formidable array of the enemies of renvoi, 59 may soon have to look for another ground of sympathy.

The new, more realistic approach to renvoi looks for international agreement rather than doctrinal solutions. The Draft Convention of the Hague Conference (1951) "to determine conflicts between the national law and the law of domicile," 59a though limited in range seeks to eliminate the most important group of conflicts. According to the Project, the reference of the national law of a person to the law of his domicile is binding both for the domiciliary state and for third countries (art. 1). In order to avoid divergent qualifications, the Draft defines "domicil." This is a considerable progress.

55 Restatement § 8.
59a Texts and general comment, supra p. 41, n. 95. For other proposals, see RABEL, 4 Int. Law Q. (1951) 402-411; German counterproposal, 17 Z. ausl. PR. (1952) 273.
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But elaborate construction in this field will still be needed, after the blank negation is suppressed.

3. Choice of Law by the Parties

The doctrine of "autonomy of the parties" is also to be noted in this connection as an example of obstinate theory opposed to universal practice. The details will be considered later in connection with contracts.

The practice allowing parties to a contract to determine the law applicable to their contractual relation, recognized in Dumoulin's theory, for centuries has been applied by courts throughout the world with slight dissent. In commercial arbitration, this right of the parties is taken for granted. If this time-honored view has recently suffered vacillation, it is due to the fanatical campaign of the handbooks in the last decades. After World War I, the Mixed Arbitral Tribunals, which were free to choose their method, had no doubt about the rule.

Despite this practice, prevailing theory attacks the freedom of the parties to a contract to determine the law that shall govern its validity, because this enables them to evade

60 An excellent comparative study on the subject is the book by H. Batiffol, Les conflits de lois en matière de contrats (1938).
61 The Swiss Federal Court had held that the questions connected with the formation of a contract, such as those concerning consent, fraud, error, formalities, power of attorney, are inaccessible to the parties' choice of law; it seems that these questions were determined, preferably at least, under the law of the place of contracting. See BG. (Nov. 7, 1933) 59 BGE. II 397, 399; BG. (July 12, 1938) 64 BGE. II 346, 349. Recently, concededly under the influence of the Swiss writers, the court has admitted that the formation of a contract also is generally governed by the parties' choice of law, with the exception of formalities and the capacity to contract; BG. (Feb. 12, 1952) 78 BGE. II 74, 83 with note Gutzwiller, 10 Schwz. Jahrb. (1953) 304; (Aug. 27, 1953) 79 BGE. II 295, 299.
62 Rabel, 1 Z. ausl. PR. (1927) 42.
63 See the endless lists of majority opinions by Caleb, Essai sur le principe de l'autonomie et de la volonté en droit international privé (1927) 81; Melchior 500 § 353 n. 1; Gutzwiller 1606 n. 1; Batiffol 11. Exceptional positions were taken by Kosters (1917) 733; Survile (1925) 351.
compulsory rules of a law otherwise controlling. It has been said that to allow parties to select their law would elevate them to the rank of a legislature and delegate to them a sovereign power. Hence, it is supposed, each contract must be localized in one state whose law shall prescribe whether the contract is valid and whether, or to what extent, the parties are allowed to submit controversies to the law of another state. To recognize an agreement respecting applicable law before determining which law governs the validity of the agreement, is accordingly regarded as putting the cart before the horse.

On the other hand, courts operate on the unassailable basis of a customary, extremely well-settled conflicts rule. Autonomy is needed in the first place by international and, in this country, also by interstate commerce. For such matters, at least in peace time, few compulsory, imperative rules of law are provided in the national legislations; existing prohibitions will more often than not be considered by the court in which the contract is in issue either from the viewpoint of local public policy or as a defense based on illegality of performance. Thus, the danger that prohibitions established by one law may be evaded by a party exercising the right to select another law is practically negligible, so that a state ordinarily has no substantial interest, as the theory postulates, warranting intrusion into the international freedom of contracting. On the contrary, the merchants have an enormous interest that a certain and preknown body of rules should govern future litigation. They are surrounded by a chaos of national conflicts laws and national legislations, private and commercial. Contracts between merchants of different nations are likely to touch several territories. No attorney is able to predict the law under which the various rights and duties of the parties will be adjudicated in all courts in which litigation may occur. This primordial need for relative cer-
tainty is documented by the multitudinous usages and standard forms of the several branches of international trade and impels courts familiar with business requirements, British, French, German, and Swedish, to grant the parties wide latitude. They usually assert without qualification that the applicable law is determined by the parties. 64

Nonmercantile situations must be independently evaluated. The case in which Dumoulin advocated autonomy of the parties involved marriage settlements; the French courts still insist on free choice of law by the parties in this case. The prevailing view, however, is that the law governing in the absence of a settlement, controls the permissibility of the settlement, 66 including any agreement respecting the applicable law. In fact, as contrasted with business contracts, marriage settlements are frequently subjected to restrictions imposed by law.

The attitude of the courts has finally received the support of a succession of German 66 and an increasing number of French 67 writers. The dominant theory has also been criticized of late in the United States; 68 that the cases do not

64 See, e.g., for English dicta, Cheshire 206.

65 See infra, Effects of Marriage on Property, Chapter 10.

66 The first opposition to the dominant reasoning was expressed in my observations, 1 Z. ausl. PR. (1927) 42 n. 1, and Book Review, 4 Z. ausl. PR. (1930) 417; also in 18 Revista Der. Priv. (1931) 321, 363, for the reasons explained above; more study was given with arguments of varying kind by Haudek, Die Bedeutung des Parteiwillens im internationalen Privatrecht, Rechtsvergleichung, Abhandl. no. 7 (1931); Melchior 498 § 351 ff. (1932); Nussbaum, D. IPR. 214 (1932); M. Wolff, IPR. 139; Priv. Int. Law 416; Raape, IPR. 424; Dölle, 17 Z. ausl. PR. (1952) 170; also the Swiss author Niederer 193–196.

67 Lerebours-Pigeonnierre, Note, Dalloz 1931:2:33 and Précis no. 251; Wigny, “La règle de conflit applicable aux contrats,” Revue Dr. Int. (Bruxelles) (1933) 676; Planiol, Ripert et Esmein, 6 Traité pratique 641 no. 467; Perroud, Clunet 1933, 289; Batiffol 8; J. Donnedieu de Vabres 253; Maury no. 541; also Jeanprêtre, Les conflits de lois en matière d'obligations contractuelles, selon la jurisprudence et la doctrine aux États-Unis (1936) 137. Cf. Rheinstein, Book Review, 37 Col. L. Rev. (1937) 327.

68 Cook, "‘Contracts’ and the Conflict of Laws," 31 Ill. L. Rev. (1936) 143 at 145; Cook, Legal Bases (1942) at 349; and ibid. 389; and see Lorenzen and Heilmann, "The Restatement of the Conflict of Laws," 83 U. of Pa. L.
confirm the hostility of the Restatement to election of law by the parties, is well known.\textsuperscript{69}

Hence, the recent literature interests itself more in the limits to be imposed upon the autonomy of the parties' intention than in challenging its existence.\textsuperscript{70} Consideration was given to a particularly important phase of this problem in connection with the uniform conflicts rules in relation to sales of goods prepared by the International Law Association and the Sixth and Seventh Hague Conferences.\textsuperscript{71} The British lawyers were in significant opposition to the insistence of Continental scholars that the validity of an agreement making a certain law applicable, should be subject to the same law that, under the intended Convention, should be applied in the absence of such agreement. The proponents of this restriction claimed that this would ensure greater certainty for the parties than if the law of the forum were to determine the validity of the agreement. In the Draft Convention of the Seventh Hague Conference (1951), the former view was adopted recognizing for international sales the parties' free choice of law unrestricted by some "primary law" or a "legitimate interest" of the parties. However, the entire discussion and others that followed in the literature make it desirable to sound a warning that business security will be further menaced by ensnaring commercial autonomy in a net-

\textsuperscript{69} See the writers cited in the precedent note and in a detailed criticism by Nussbaum, "Conflict Theories of Contracts: Cases versus Restatement," 51 Yale L. J. (1942) 893.


\textsuperscript{71} A clear résumé is to be found in Int. Law Association, 35th Report (1928) 136 ff.
work of limitations through a combination of substantive and conflicts rules.

Of course, when the world enjoys a reliable uniform conflicts law, neither renvoi nor self-choice of law will be so largely needed as today.

II. THE PURPOSE OF CONFLICTS LAW

1. Uniformity

Since Savigny, it has been customary to regard the attainment of uniform solutions as the chief purpose of private international law. Cases should be decided under the same substantive rules, irrespective of the court where they are pleaded.\(^\text{72}\) We may gratefully note that this postulate has continued in favor, if only as an ideal remote from reality, at a time when separate conflicts laws have grown up in the various countries and their diversities have been prized. The real value of this postulate under present conditions is that it forms a test for the relative convenience of conflict rules.\(^\text{73}\) The time has come to approach the goal with more energy.

One of the considerations leading to a universally useful rule is the legitimate expectation of the parties. Not to disappoint fair assumptions by persons disposing of property or entering into engagements, was the justified motive of the twisted doctrines protecting vested rights.\(^\text{74}\) For example, formalities are subject to the law of the place where a transaction has been concluded; the acquisition of property is governed by the law of the situs as of the time of the acquisition;

\(^\text{72}\) Savigny § 348; recently, for instance, Taintor, "'Universality' in the Conflict Laws of Contract," 1 La. L. Rev. (1939) 695, 699; Hancock, Torts in the Conflict of Laws (1942) 54.


capacity to contract a business obligation partly is, or should be, determined by the law governing the validity of the contract, et cetera. "When a matter has been settled, in conformity with the law then and there controlling the actions of the parties, the settlement should not be disturbed because the point arises for litigation somewhere else." 75 This "fundamental premise" suggests that courts should search, in the absence of express intentions with respect to the applicable law, for the "tacit" and eventually the "presumed" intentions of the parties.

Moreover, as a European writer has recently postulated, when a fact or an act is governed by a certain law according to all the conflicts laws practically involved, this law should be applied by any court before which the case may come as a result of subsequent circumstances. 76

In a more general way, Savigny regarded it a guarantee of uniform treatment of legal relations that the law of that place where the relation has its legal "seat" should be applied everywhere—a conception that through Wharton has been admitted in the Supreme Court of the United States. 77 Gierke substituted for "seat" "center of gravity"; Bar sought localization "according to the nature of things"; and Westlake recommended the law of the state with which the relation has closest connection. All these formulas tend toward the same goal, the importance of which still is in no wise impaired. But the obstacles barring the way to the goal have increased since the world order envisaged by Savigny has been dissolved into more than a hundred national legal systems.

In view of the difficulties of reaching uniformity, a more modest aspiration has been correctly proposed by Cook,

75 Goodrich, 36 W. Va. L. Q. (1930) 156, 164, supra n. 74.
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namely, to attain "as much certainty as may be reasonably hoped for in a changing world" and is compatible with "needed flexibility." 78

2. Policy Considerations

A just result or the realization of prescribed policies is now often viewed as the main purpose of conflicts law. 79 This is right without doubt, if certain fundamental distinctions be borne in mind. 80

(a) The usual confusion of private and conflicts laws has engendered the conception that both have to follow the same pattern of values and purposes. If this were true, all the differences that permeate the national laws with respect to the organization of the family, the categories of property rights, freedom of contract, privileges and duties, public interests, and so on, would be reflected, nay reproduced, in the conflicts rules of the divers countries. The writers have formulated their axioms according to their particular views. Kahn, 81 for instance, who considered relationships created by internal law to be the subject matter of conflicts rules, required conformity with the fundamental idea of the internal institution. If, in the doctrine of the internal law, parental power is regarded as a mere right, the father’s personal law should govern; if the father’s duty is accentuated, the law of the child. Under Pillet’s leadership, French writers transformed their doctrine of sovereignty 82 so as to require the determination of what law ought to govern capacity to contract, succession on death, etc., in conformity with the "social

78 COOK, Legal Bases 432.
79 See in particular NEUNER, Der Sinn (1932); CAVERS, "A Critique of the Choice-of-Law Problem," 47 Harv. L. Rev. (1933) at 173; NEUNER, "Policy Considerations in the Conflicts of Laws," 20 Can. Bar Rev. (1942) at 486; HARPER and TAINTOR, Cases (1937) 55, recognize "a desirable result" in their third and fourth classification of "social policies."
80 RABEL, 5 Z. ausl. PR. (1931) 284.
81 KAHN, 1 Abhandl. 112.
82 See De Vos, 15 Revue Inst. Belge (1929) 1, 97; 16 ibid. (1930) 133.
purpose” of the state regulations pertaining to personality, family, security of commerce, etc.; the applicable law is that which most efficiently protects the purpose fostered by the forum’s own domestic legislation.\textsuperscript{83}

This identification of motives, sometimes extremely consequential, aggravates the difficult task of the conflicts law beyond all limits. To care for social prosperity is the responsibility of the municipal private laws, which have to resolve the merits of each particular problem. The principle, \textit{jus suum cuique tribuere}, instructs legislators and judges to ponder carefully private and public interests. But this is what each private law does for itself; the function of private international rules is to choose the applicable law with all its evaluations whatever they may be. Existing conflicts law presumes that all laws of civilized countries are of equal rank, not to speak of sister states in a federation. Assuredly, the origin of this idea was political, and its modern theoretical foundation came from its connection with the law of nations. But, as things are, to inject national policies directly into conflicts law, will destroy it. In such event, “international public order” would embrace all internal laws.

(b) When preconceptions are eliminated, policy in the field of conflicts law is of course the main object of concern. Conflicts rules have never been entirely uninfluenced by the underlying social situation. This is pioneer ground. How the interest of the state, of other states, of the parties, of third persons in good faith, of commerce or trade in general, are to be valued against each other in various situations and best reconciled with the postulate of certainty, needs renewed and detailed deliberation. For the time being, it would be entirely premature to try to enumerate or to analyze such considerations in a general way.\textsuperscript{83a}

\textsuperscript{83} See the illustrations of \textit{Niboyet} 500 no. 416.
\textsuperscript{83a} For recent discussions, especially by American and German writers, see \textit{Neuner}, “Policy Considerations in the Conflict of Laws,” 20 Can. Bar Rev.
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(c) The postulate that conflicts rules should have just results may be understood—or perhaps misunderstood—as signifying that the outcome of lawsuits in every case should conform, not to the *lex fori*, but to the judge's sense of justice.

We well know that courts will try many direct or devious ways to satisfy this sense of justice. They will use the faculty to reject a foreign rule on the ground of a public policy of the forum. They will classify an unwelcome foreign rule as inapplicable foreign procedure. They will, with a desired end in view, affirm or deny a person's domicil. And we may trust the courts always to select, of two accessible ways, that which leads to the result to them appearing preferable. These expedients of judicial wisdom cannot be closed entirely, and should not be, while conflicts rules remain crude and vague. It is good to know that inscrutable judgments occasionally alleviate the conflicts chaos.

Yet, subservience to subjective and local values would be dangerous and unsound as a general policy. Cavers seems to envisage disintegration of conflicts rules as the consequence of his postulate of just results and, by way of palliation, recommends re-enforcement of the doctrine of *stare decisis* and recourse to standards. Such programs, not sufficiently detailed, are disturbing.

Several points discussed in this chapter are illustrated in


84 American courts prefer to satisfy a desirable solution in usury cases than to have all decisions harmonized. See Stumberg 237, and Wengler, Book Review, xi Z. ausl. PR. (1937) 967.

85 Cavers, 47 Harv. L. Rev. (1933) 173 at 196, *supra* n. 79. Recently Cavers himself has confessed troublesome doubts concerning his reference to social and economic considerations, Book Review, 56 Harv. L. Rev. (1943) 1170 at 1173.
the case of St. Louis–San Francisco Railway Company v. Cox. The plaintiff, having been injured on a passenger train in Missouri, for consideration released her rights to the local agency of the railroad by a document executed in Missouri. Under a statute of Missouri, she could not bring an action to cancel the release without refunding the sum received. Without doing so, she sued in Arkansas, and the Supreme Court held (1) that the failure of tender was characterized in Missouri as going to the basis of the right, but (2) that in Arkansas such a suit could be prosecuted without returning the sum, and (3) that, therefore, the question being merely procedural in the forum, the suit should be allowed. From the viewpoint of a sound system (or of analytical jurisprudence), there are three fundamental objections to be made. (1) The Missouri provision is questionable, though possibly directed against ambulance chasing. (2) Yet, even if wrong, the provision is of course substantive, affecting the material rights of the plaintiff, any procedural consequence being merely accessory. The law of Arkansas not requiring tender is equally substantive; it denies what the other law affirms. (3) The Court evidently applied the law of the place where the contract was made and performed. On this ground, it should not have evaded its own conflicts rule, as it did by a characterization according to the alleged lex fori. What really was intended is obvious, however. The court wanted desperately to satisfy its own sense of equity as against an objectionable foreign law.

III. Rationalization

1. Special Rules

Inductive methods include the creation of special rules for typical situations. Case law in this country has produced a

wealth of such specific rules, whereas the European codifications have been satisfied to formulate conflicts rules in very broad and generalized terms. Specialization of the rules has recently become a recognized tendency, particularly in the field of obligations, in which, even in this country, general axioms have done much harm. The Institute of International Law has been active in this direction since 1908. The Polish Law of 1926 (art. 8) and the Czechoslovakian Law of 1948 (§ 44-46) state different points of contact appropriate to the various types of contract—contracts executed at an exchange or market, retail bargains, construction and employment contracts with the state and other public corporations, insurance contracts, contracts with attorneys and similar persons, employment by business enterprises, et cetera. The Permanent Court of International Justice has held that a governmental loan by issue of bonds having several places of payment is subject to the law of the issuing government. 87 Maritime shipping contracts have been made the subject of special international conventions. 88 The scope of a power of attorney is determined under the law of the state in which the agent acts. 89 Courts in all countries have elaborated a wide-flung net of specialized solutions by localizing contracts according to the "tacit," "presumed," or simply the fictitiously assumed intent of the parties. 90

This growing emphasis on the law corresponding to the particular type of contract has two additional wholesome effects, namely, promotion of uniformity, since types of contracts are the same everywhere under modern circumstances, and concentration—so far as feasible—on one convenient

87 Judgments nos. 14 and 15 of July 12, 1929.
88 Cf. for instance, the provisions of the Montevideo Treaty of 1889 on commercial law, arts. 14 and 15, changed in the Draft of 1940 on commercial maritime law to art. 25.
89 Restatement § 345; RABEL, 3 Z.ausl.PR. (1929) 812 ff.
90 For a synthesis, see BATIFFOL.
law. In the latter regard—the problem of dépeçage—\textsuperscript{91} it is noteworthy that both American and Continental conflicts laws suffer from cumulated application of several conflicts rules, referring to different legislations, to one and the same contract. The Restatement, for instance, divides the problems arising on a contract into two parts, subjecting one part to the law of the place where the contract is concluded and the other to the law of the place where the contract is to be performed.\textsuperscript{92} The division is precarious and very objectionable in several respects, but chiefly because a contract should not be split on \textit{a priori} grounds. A similar distinction between the creation and the effect of contracts was admitted by the Swiss Federal Tribunal.\textsuperscript{93} Still worse, the German courts allocate the duties of the seller and the buyer to the laws of their respective places of performance, these, if not otherwise provided, being presumed to be at the corresponding domicils. A bilateral contract cannot be broken up into such fragments without distorting a number of problems.\textsuperscript{94} All such rules will vanish when the different types of contracts in general form the center of interest.

Another point will hold our attention in the next chapters. Capacity to contract is generally determined in this country by the law of the place where the contract is made, a law not necessarily the same as the law governing the contract in other respects, for instance, that intended by the parties. In Continental Europe, an individual’s capacity is determined as a rule by his personal law, a law potentially different from that or those governing other aspects of the contract. In both hemispheres, the respective rules concerning capacity appear overextended, and the distinction between capacity and other

\textsuperscript{91} For theoretical discussion of the method of connecting isolated parts of the facts with different countries, see Wengler, 8 Z. ausl.PR. (1934) 230.

\textsuperscript{92} Restatement §§ 332 and 358; cf. in particular Cook, Legal Bases, 345, 346.

\textsuperscript{93} Supra n. 61.

\textsuperscript{94} See Neuner, 2 Z. ausl.PR. (1928) 108.
aspects of contracts, at least in certain cases, should be abolished. 95

2. Independent Conflicts Rules

The crucial point to be reformed is the blind subjection of conflicts rules to the private law of each country. The extremely broad and at the same time fragmentary rules usual in the enacted conflicts laws of the nineteenth century, including the Introductory Law to the German Civil Code, incorporate language taken from provincial legal thinking. As these rules are progressively refined, the more urgent is their independence of notions defined by the law of the forum in order to enable other legal systems in the pertinent cases to be invoked.

This need is by no means limited to "characterization." Cook has pointed out how often in this country confusion is caused by applying the "law" of a state, without exact inquiry whether such law is not limited to domestic cases and raises no question of conflicts law. 96 Thus, a statute of Texas prescribing that a married woman cannot charge her separate estate to secure her husband's obligation, does not necessarily impose such restriction upon a wife domiciled in another state, even when the transaction occurs in Texas. 97 Resort to statutory construction is the usual method of avoiding faulty conclusions. This method, however, should be limited to its natural domain. A statutory provision must be analyzed in respect to the question whether it incorporates a fundamental policy of the state (as in the case of the Texas statute mentioned). It may occasionally occur also, as we have remarked before, that a private law rule is not intended or is not fit to be applied in another jurisdiction, a situation

95 Infra pp. 210 ff.
96 COOK, Legal Bases.
97 COOK, Legal Bases 438, 439.
that much more frequently occurs in the case of administrative (police) regulations. But answers to the regular questions of conflicts law are rarely contained in municipal statutes. Private law rules ordinarily do not direct which persons or movables they include. It is as mistaken to apply such rules blindly to events all over the world as to presume them limited to merely domestic situations. They are simply neutral; the answer is not in them. Generally, therefore, what is needed, or even feasible, is not an interpretation of the statute but a rule of private international law to accompany and delimit the rule of private law. A striking example is the confusion exhibited in determining the relation between adoption and inheritance statutes in different states, a confusion chiefly attributable to futile attempts to interpret one or the other of these statutes, neither dealing with conflicts questions.98

A full program for the needed reform cannot be outlined in this place. There is no reason why this branch of law should not enjoy the abundance of legal devices, characterizing modern private or penal law.

3. Internationalization

Against the expectation of a priori theorists, it is remarkable to what extent conflicts rules are able to serve in many countries, once relieved from the burden of local legal techniques and related to situations in actual life. The modern means of communication, the organization of international trade, the progress of science, and some general trends in the evolution of social policy, provide a common basis. An unbiased examination of the actual facts represented by an international sale, an employment contract, a claim for workmen’s compensation, or a negotiable instrument payable to the holder, should and will result in similar solutions every-

98 Infra pp. 210-212 and 698.
where. As a matter of fact, there exists a truly international consideration of all these and many other matters, which encounters few obstacles in national legal peculiarities but many in doctrinal traditions.

Here it is that comparative research again comes in to indicate whether and, if so, to what extent unification or mutual reconciliation is feasible and desirable. In one respect, this statement requires qualification. With little justification, the comparative method is often suspected to favor imitation of alien ways and to sacrifice national characteristics. The facts are to the contrary.\(^99\) Not infrequently, foreign institutions, naively adopted without adequate comparison, have been transplanted from their natural soil to degenerate in uncongenial surroundings. Often also, "reception" of foreign legal institutions has occurred without appreciation of the grave defects inherent in an admired law. Scientific comparison discerns the essential from the accidental causes and effects of legal rules; its purpose is to enrich, rather than to standardize the juridical world.

Conflicts law, however, has its own measures. It urgently requires sanctuaries from chaos. The more private rights are protected by international justice, the more will unification be desired. Federations such as the United States or Switzerland\(^100\) know from copious experience how indispensable is a common background of legal concepts and principles to cope with the peculiar terms and ideas of particular states or

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\(^99\) See, for example, Fustel de Coulanges, La cité antique 2: "Pour avoir mal observé les institutions de la cité ancienne, on a imaginé de les faire revivre chez nous." Heymann, Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn (1917) 96; Eugen Huber, Erläuterungen zum Vorentwurf des Schweizerischen Zivil-Gesetzbuchs 7; Rabel, Aufgabe und Notwendigkeit der Rechtsvergleichung, published as Münchener Juristische Vorträge Heft 1 (1925) 9, 23.

\(^100\) BG. (June 30, 1905) 31 BGE. I 287: for the purpose of intercantonal conflicts law, the scope of matrimonial property law, as contrasted with inheritance law, is to be defined according to the general Swiss concepts and the nature of things rather than according to the cantonal laws involved in the case.
cantons. The Mixed Arbitral Tribunals of the 1920's plainly exemplified the situation of courts that lack a "law of the forum" in the ordinary sense of the term and have no conflicts rules other than those that happen to coincide in the participating states.\textsuperscript{101} The great expectations for a development of this branch of law by these courts, first dealing on a large scale with international private causes, were disappointed.\textsuperscript{102} After the present catastrophes, fervent hopes may well attach to supranational courts adjudging private actions of international significance.\textsuperscript{103} But any substantial development of such judicial relief will have to be accompanied by a radical turn of choice of law rules from provincial to world-wide thinking.

The new trend can be summarized in the three-fold effort toward realism, comparative method, and international understanding.

\textsuperscript{101} See RABEL, I Z. ausl. PR. (1927) 33–47.
\textsuperscript{102} On the conflicts cases of the Mixed Arbitral Tribunals see GUTZWILLER, "Das Internationalprivatrecht der durch die Friedensverträge eingesetzten Gemischten Schiedsgerichtshöfe," 3 Int. Jahrbuch f. Schiedsgerichtswesen (1931) 123.
\textsuperscript{103} The Institute for International Law proposed in 1929 to extend the jurisdiction of the Permanent Court of International Justice to disputes concerning the interpretation of the conventions on private international law; see Annuaire 1929 III 305. This suggestion has been taken up by the Protocol of March 27, 1931 (\textit{supra} p. 36), recognizing the competence of the Permanent Court of International Justice to interpret these Conventions. In my opinion regional international courts and a second division of the World Court should be created to deal with various kinds of private claims having international significance.