PART EIGHT

CONTRACTS IN GENERAL
In this part, the following articles published in law reviews will be cited in abbreviated form:


THE term, contracts, is taken hereafter in the narrow sense, restricted to agreements creating obligations, in which it is used at common law. This excludes agreements disposing of family or property relations. Also, conventions modifying or terminating existing obligations need separate treatment. Nor are unilateral declarations directly involved.

I. THE PROBLEM OF AMERICAN LAW

The conflicts law concerning contracts is known as a source of difficulties, particularly in the United States. Commonly, the authorities are declared to be in great confusion and full of contradictions, and to be inconsistent in the same court. The courts are said to choose without discernible coordination among at least four approaches, namely,

1. The law of the place where a contract is made (lex loci contractus),

2. The law of the place where the contract is to be performed (lex loci solutionis),

3. The law intended by the parties to be applied (party autonomy),

4. The law which upholds the validity of the contract.

The Appellate Division of New York declared in 1936

that, in determining which law governs the validity of a contract, the cases in that state variously regard as decisive: the place where the contract was made, the place of performance, the intention of the parties, or the grouping of the various elements which have gone to make up the contract. The court in the case at bar employed all four methods, resulting in the same conclusion. Thus, not even that important state can be classified in one of the various alleged systems.

The leading authors have been in no greater harmony, except in stating the uncertainty. Recently, in interpreting the prevailing tendencies of the courts, four or more propositions have been set forth. Beale, who very vigorously preferred the law of the place of contracting for determining the validity of a contract, believed that his theory had become victorious. Lorenzen has been a most influential supporter of an opposite opinion favorable to the law of the place of performance and the law tending to validate the contract. In Batiffol’s view, the great majority of cases actually apply the law of the place of performance whenever there is a point in so doing. Nussbaum is the only writer to deny that there is confusion; he thinks that the decisions in reality exemplify a method of individualizing the facts and selecting the law most appropriate to the intention of the parties. In the present writer’s opinion, there is a strong old school tradition establishing as a basic or subsidiary rule, the law of the place of contracting; a second powerful theoretical current toward the law of the place of performance; and side by side, very many cases following mechanically one of

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3 Beale, 23 Harv. L. Rev. (1909) 1, 8; 2 Beale 1096, 1171.
4 Lorenzen, 30 Yale L. J. (1921) 655, 673.
5 Batiffol §§ 96, 97.
6 Nussbaum, D. IPR. 223; id., 51 Yale L. J. (1942) 892, 919; id., Principles 177ff
these scholastic approaches, and very many others thoughtfully seeking a suitable law by some method or other. No single rule can be rested on the wealth of cases, but none is alien to all of them.

Again, if, according to certain methods used by Beale, the American jurisdictions were believed to be bound by conflicts rules prevailing traditionally in the courts of individual states, the picture of interstate affairs would be illustrated by this following example.

A merchant in Massachusetts (which is said to adhere to the rule of lex loci contractus), by intervention of a New York agent, enters into a transaction with a resident of California (where the lex loci solutionis is prescribed by statute), performance being due in Connecticut (a state clearly following the theory of intention of the parties). The requisites of a valid contract are established: in the Massachusetts courts by the law of New York; in the courts of California by the law of Connecticut; in the Connecticut courts according to the circumstances of the case; and how in New York nobody knows.

Parties wanting to secure their transaction against the possible legal intricacies of the unknown governing law, would be made more helpless by the assertion popular in the literature that they cannot escape imperative rules of the governing law by agreeing on the applicable law.

May it be allowed, for present purposes, to abandon the fatalistic passivity with which either the condominium of the several rules has been taken as an existent and unavoidable evil or one of the rules has been perforce erected as the present law? What the desirable method should be, has been rather well defined in the last development of the world literature. Although none of the existing legislations in either hemisphere has reached the visible goal and scholarly efforts are inchoate, we are able at least to visualize the way
to be followed and the gigantic mass of prejudices that must be cleared away.

II. The Theories

It has earlier been submitted in this work⁷ that conflicts law may allow the parties to a contract to select the applicable law. However, opinions are still divided into three main groups.

1. Theory Negating Choice of Law by the Parties

Reading the Restatement or certain Latin-American codes, one might feel that the parties are entirely unable to influence in any way the law governing their obligations. But the fact that for centuries most courts throughout the world have allowed the parties a very broad field of decision, has impelled the innumerable theoretical adversaries of "autonomy" to conceive a more moderate view.⁸ In this view, every contract rests upon one predestined municipal law called to its function by the rule of conflicts without regard to the intention of the parties in the individual case. For instance, the law of the place where the parties make the contract, is imposed authoritatively on them. To the extent that this law permits the replacing of its own provisions by stipulations of the parties, they may, instead of inventing new provisions, quote or cite or copy a section of a foreign statute. By such shorthand reference, they never do more than incorporate

⁸ The founder of this theory was Bar, see 2 Bar 4. In the United States: Minor 401; Borchard, "Contractual Claims in International Law," 13 Col. L. Rev. (1913) 457; Lorenzen, 30 Yale L. J. (1921) 565, 655, 658; 31 id. (1922) 53; Beale, 23 Harv. L. Rev. (1909) 260 and Treatise § 332.2; Goodrich 325. Lists of continental writers have been given by Caleb, Essai sur le principe de l'autonomie en droit international privé (1927) who has revived this theory; Niboyet, "La théorie de l'autonomie de la volonté," Recueil 1927, I, 5 (the most energetic advocate); see also lists by Melchior 500 n. 1; Gutzwiller 1606. On the adversaries of this theory, see Vol. I (ed. 2) p. 92 n. 66. Add the able article by Gerhard Mayer, "Zur Parteiautonomie als Kollisionsnorm," 44 Z.int.R. (1931) 103; Fedozzi-Ceretti 690 § 2; Kosters in Conférence de la Haye, Actes de la sixième session, 351.
the foreign provision as a term of their agreement, which remains controlled by the one invariable preordained law. German and Italian writers, among whom Zitelmann has grounded this doctrine on scientific considerations, distinguish this reference permitted by the governing municipal law, under the term of “contractual reception” or “materiell-rechtliche Verweisung” (reference based on the substantive law), from the forbidden reference pertaining to conflicts law.

Although language in not a few English and American decisions alludes to the embodying of particular legal terms or rules in a contract, and such a provision may be said to be a mere stipulation rather than a reference to foreign law, it would seem that a consistent distinction as in German writings is not made by common law lawyers, and correctly so. Indeed, whatever the merits of this learned distinction may be when the question is whether a contract must be divided under two laws, it is unsound to treat the reference to a foreign legal rule in the same manner as when the parties refer to former arrangements or “to a work of Bentham” (as some writer has textually suggested). Reference to a foreign legal rule is necessarily always based on conflicts law.

9 Cook, Legal Bases 399, has used the same words to refute or tranquilize “the critics of the ‘intention’ theory,” who oppose the proposition that foreign law as such should control as a consequence of the agreement. Yet, a little later Cook seems fully to accept the intention theory in its true meaning.

10 The first term is used by Perassi, Rivista 1928, 518. The second term seems to have been formed by Zimmerman, 44 Zentralblatt (1926) at 883 and was popularized by Haudek, Melchior, and M. Wolff.

11 See, for instance, Dicey (ed. 3) 61, General Principle No. VI, cancelled in ed. 5; Judge Learned Hand in Louis-Dreyfus v. Paterson S. S. (1930) 43 F. (2d) 824, 827; German Reichsgericht (Sept. 21, 1899) 44 RGZ. 300, 302; and see infra ns. 130-132.

12 Infra at n. 134. It was different when the Lords in 1703, Foubert v. Trust. Brown Parl. Cas. 38, 42, recognized the Custom of Paris of 1580, declared applicable in the contract, “as if the custom had been distinctly specified,” which “by no means (involved) an attempt to introduce foreign laws.” Foreign laws at that time were never applied in English courts. Cf. M. Wolff, Priv. Int. Law 418.

13 See this Chapter, infra sub III pp. 368 ff.
The purpose of the described theory is to demonstrate that the parties are unable to transcend the margin of freedom left them in the particular primary legal system. Under this system, all stipulations except those which they may establish in the domestic field, are also forbidden them to enter into in the international realm. The so-called “imperative” provisions, *jus cogens*, of the predestined law are clamped down on all transactions—they cannot be evaded.\(^{14}\)

*Illustration.* A citizen of New York entered in New York into an agreement with a German domiciled in Germany, without consideration as required by New York law. Under German law it was a valid contract. Could the parties decide that German law was to apply? Under § 332 (c) of the Restatement the answer is strictly no, the same as given by the majority of American, French, and Latin-American writers. The German Supreme Court had no objection to the agreement.\(^{15}\) The Supreme Court of the United States declared a contract under similar circumstances (without agreement on the applicable law) valid under the Louisiana law of the place of performance.\(^{16}\)

The problem is alike as respects capacity, formality, mutual consent, fraud and error, illegality, and any other vitiating factor. As a practical consequence, the allegedly inevitable primary legislation must be ascertained in every particular case, although this can be done authoritatively only by the court adjudging the case when the matter becomes litigious, a court unknown at the time of contracting and following its own laws and lights. If we believe some of these writers, it is not even just one law from which all “imperative norms” are to be gathered, “but the law applicable varies according to the elements of the obligation and the trans-

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\(^{15}\) RG. (April 6, 1911) JW. 1911, 532, 24 Z.int.R. 305.

action in question. It is precisely this variety and this multiplicity of effective laws that makes the matter of obligations in private international law so complex and so difficult."17

"Autonomy," however, endeavors to obviate the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course.

2. Proper Law Theory

Increasingly and with few interruptions, during four centuries from Rochus Curtius and Dumoulin to the rise of the learned opposition in our century and ever since, unruffled by all objections, courts have followed an all-inclusive doctrine of intention of the parties covering the entire field of obligatory contracts. The parties may express·ly declare which law should govern their obligations; or they may tacitly choose this law; or the judge has to ascertain the law they may have contemplated in contracting. These three possibilities of express, tacit, and presumed or "hypothetical" intention are the only devices for localizing any contract, although the courts have developed certain criteria for construing unexpressed intentions.

The purest form of this doctrine appears in England18 and is known as the doctrine of the proper law. As last formulated by Lord Atkin:

"The legal principles which are to guide an English Court on the question of the proper law are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of

17 ARMINION (ed. 2) 327 § 111.
the contract and the relevant surrounding circumstances." 19

And Lord Wright, speaking for the Judicial Committee of the Privy Council, stated:

"It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply. That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances." 20

The peculiar character of this traditional approach should be well noted. The phases of choice of law according to the intention of the parties are three also in the modern opinion, but not identical with the above-mentioned traditional distinction. In the German view, for instance, the parties may have agreed on the applicable law; the judge may try to conform to the presumable will of the concrete parties; or the judge may seek a law conforming to the empirical intention of average parties. It is entirely characteristic of the genuine proper law theory that no such distinction is made. From the beginning of the English doctrine, when Lord Mansfield emphasized that the parties at bar had a view to the laws of England, 21 the courts assumed that the parties always contract with a certain law in mind, either "with an express view" to it, as in Lord Mansfield's case, or tacitly. The court only discovers this view. The Swiss Federal Tribunal, which generally applied the law of the place of performance to the effects of all contracts, insisted upon the statement that this is done, only because and to the extent

21 Robinson v. Bland (1760) 2 Burr. 1077, 1078; cf., e.g., Warrender v. Warrender (1835) 2 Cl. & Fin. 488, 535: "The parties in a contract like this must be held emphatically to enter into it with a view to their own domicile and its laws."
that this law corresponds with the presumable intention of the parties in the particular case. In the very large domain practically covered by this idea, no distinction is made among an agreement, an existent volition, and a merely supposed intention.

While eminent continental writers of the 19th century continued to accept the doctrine, in more recent times the bulk of the literature went the other way. But quite recently, a few scholarly attempts have been made to support this all-inclusive intention theory of the courts, in straight opposition to the anti-autonomy doctrine prevailing thus far. The most energetic theoretical foundation of the broadest conception of party autonomy has been undertaken by Batiffol.

In developing a suggestion by other writers, he teaches that the parties never really select the law, not even when they expressly agree on choice of law. They merely localize the contract. The court, then, determines the law, following their lead. The conflicts rule approves the law of the place where the contract has its center of gravity. The parties influence the latter by establishing locally connected obligations, or more directly, by selecting among several local contacts that


23 E.g., 1 Foelix § 94; 1 Fiore § 112; Despagnet § 294; Asser-Rivier, Éléments 71.


24 M. Wolff, IPR. (ed. 1) 86 par. 2, 88, and in “The Choice of Law by the Parties in International Contracts,” 49 Jurid. Rev. (1937) 110, explains party autonomy by the assumption that the parties may constitute one of the existent local contacts of their contractual relationship as the decisive point of gravity. But it appears from the latest edition (ed. 3, p. 139) and from his English book, Priv. Int. Law 415, 428, that Wolff’s own theory is not really much different from that proposed here.

Related theories, however, have been advanced by Italian authors, such as Perassi, Rivista 1928, 516; Betti, id. 1930, 15; Baldoni, id. 1932, 351; Fedozzi-Cereti 697.
one which in their own eyes is the closest or the most convenient. As they must know best about this center of gravity, the conflicts rule relies on their choice. Batiffol claims by this conception to conform to many modern needs and, at the same time, to rescue the traditional practice.

However, irrespective of results which must be reached under any approach, such a harmonization jars with the facts at both ends. An agreement of the parties to subject their contract to New York law is itself a perfectly serious contract that cannot be degraded into a mere "localization" or disposal of the center of gravity. Why should this contract be a simple element for the finding by a court, instead of a binding transaction legalized by the conflicts rule, as all recognized contracts are sanctioned by law? Again, in the unquestionably prevailing cases, the parties do not agree on the applicable law and have no law in mind, or else each party thinks of a different law. In all these cases, choice of law cannot be based, as it must be in the first case, on an actual will of the parties.

Moreover, were it true that choice of law is bound to follow the distribution of local connections, besides fatal consequences that have been inferred to these connections respecting the pretended territorial limits of party autonomy, the contract would be necessarily split into segments, each governed by a local law, a proposition justly abhorred by the very authors mentioned.

3. Theory Permitting Agreement of Parties on the Applicable Law

Despite some resistance by writers, there is practically no doubt that the parties to a contract have a right to determine

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97 Batiffol 156 § 176 and often; cf. the authors cited infra n. 30.
91 See infra Chapter 29, p. 408 n. 56.
29 Batiffol 69 § 77.
by agreement the law applicable to their contractual relationship. Only the limits may be controversial.

Such agreement is a true contract, having all requirements of a contractual engagement, but auxiliary to the main contract. A subtle controversy as to the law by which this accessory stipulation itself is governed offers more academic than practical interest. No case is known in which the law agreed upon would not be suitable for determining also the validity of the additional stipulation, provided that the forum has no specific objection.

An agreement may be declared expressly or by implication (tacitly, by conduct) as any other informal act. Implied agreement is closely related to, and often hardly distinguishable from, presumed intention, but in theory, at least, it is distinctly characterized. The parties are not presumed but positively assumed to have agreed on, not only thought of, the legal system to be applied. For instance, when an international loan debenture, written in English, follows the American legal terminology, appoints a bank in Manhattan as trustee in the American fashion, expresses the money amounts in dollars and makes the capital repayable in New York—no one should doubt that the parties themselves have selected the law of New York, even though they omitted to say so in a clause. Or, when it is stipulated in an American sales contract that it should be deemed to have been made at

30 Haudek 88ff.; Raape, IPR. 424, 433; Swiss BG. (Aug. 31, 1953) 79 BGE. II 295, 300. Contra: Melchior 519 n. 3; Batiffol 46 § 52; M. Wolff, 49 Jurid. Rev. (1937) 130; Rheinstein, Book Review, 37 Col. L. Rev. (1937) 330. These authors include implied intention and therefore think of "a coinciding view of the parties" rather than of a contract.

31 See, for various views, Wahl, 3 Z. ausl. PR. (1929) 802; Haudek 91; Melchior 520; Raape, IPR. 433; Niederer, 59 Z. Schweiz R. (N. F.) 249 and Einführung 197; Nial 23; Borum 152; application of the law agreed upon to the problem of the conditions for consent to the agreement, as in the text above, has also been suggested by the special committee on conflict of laws concerning sales of goods (1931) art. 2 par. 3, 7 Z. ausl. PR. (1933) 957 and has been adopted in the Draft Convention of the Seventh Hague Conference (1951) art. 2 par. 3.

32 Rabel, 10 Z. ausl. PR. (1936) 492, 496.
the domicil of the vendor, this means as much as to refer directly to the law of that domicil.

Where only a "presumed" or "assumed" intention is ascertained, the applicable law is selected by the court rather than the parties. But that courts and enactments so often have treated all these categories on the same footing, may rest on practical wisdom. Tacit agreement of the parties, their probable ideas, and the efforts of a judge to find the law most appropriate to the contract made by them, are closely related and somewhat overlapping categories. To treat these groups by essentially divergent rules increases the difficulties inherent in the matter.

III. THE PRESENT SYSTEMS

1. Outside the United States

*Autonomy recognized.* Most codes recognize either in a complete formula "the law to which the parties expressly or tacitly intend to refer," or "the intention of the parties," or establish divergent provisions, only "if nothing else has been agreed upon." In British common law since Lord

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33 Case of Montreal Cotton & Wool Waste Co. v. Fidelity & Deposit Co. of Maryland (1927) 261 Mass. 385, 158 N. E. 795.
33a Recently, an excellent comparative survey in Yntema, "'Autonomy' in Choice of Law," 1 Am. J. Comp. Law (1952) 341-358.
34 French Morocco: Decree of Aug. 12, 1913, art. 13 par. 1.
35 Spanish Morocco: Dahir of 1914, art. 20 par. 1.
36 Siam: Law on private international law of 1939, § 13 par. 1.
37 Greece: C. C. (1940) art. 25. This was also the theory of the Supreme Court, decision No. 131, 1932, 43 Themis 449.
38 Austria: Allg. BGB. §§ 36, 37 (but see pp. 371f.).
39 Belgian Congo: Decree of Feb. 20, 1891, art. 11 par. 2.
40 China: Int. Priv. Law, art. 23 par. 1.
42 Iran: C. C. art. 968 (only for foreigners).
43 Italy: Disp. Prel. (1865) art. 9 par. 2; Disp. Prel. (1942) art. 25. But as to the former art. 58, C. Com., see Cass. (Jan, 21. 1928) Rivista 1928, 514.
44 Japan: Int. Priv. Law, art. 7.
45 Quebec: C. C. art. 8.
46 Portugal: C. Com. art. 4.
47 Syria: C. C. (1949) art. 20 par. 1.
48 Benelux-Draft, art. 17 par. 1.
CHOICE OF LAW BY THE PARTIES

Mansfield's famous dictum and in the great majority of the other countries, the courts firmly hold the same view, which also has been shared by the Mixed Arbitral Tribunals and—so far as the case required solution—by the Permanent Court of International Justice.

Austrian Civil Code. Parallel to the broad reservations for the law of the forum which the Austrian Civil Code and its followers in Latin America have established with respect to the capacity of nationals, they have restricted the principle of party autonomy in favor of the law of the forum. The Austrian Code provides:

§ 36. If a foreigner in this country enters into a bilaterally obligatory transaction with a national, it shall be governed by


Australia: McClelland v. Trustees Executors and Agency Co., Ltd. (High Court of Australia 1936) 55 Commw. L. R. 483 at 493 opinion per Dixon, J.


Bulgaria: See MAKAROV, 8 Z.ausi.PR. (1934) 660.


Germany: "In an overwhelming number of decisions," see MELCHIOR 501 § 355, and for the cases from 1869 to 1892 see NIEMEYER, Positives Intern. Privatrecht 92 § 177.


Rumania: See JUVARA, Actes de la 6ème Conférence de la Haye 336; PLASTARA, 7 Répert. 75 No. 248.

Spain: GOLDSCHMIDT, 2 Sistema 82; see Trías de Bes, "Conception de droit international privé etc.," Recueil 1930 I 657; 6 Répert. 257 No. 124.

Sweden: ALMÉN, 1 Das Skandinavische Kaufrecht (1922) 50.


40 Judgments in the cases of the Brazilian and the Serbian Loans, Publications of the Permanent Court of International Justice, of July 12, 1929, Series A, Nos. 20 and 21, at 41, Clunet 1929, 977, 1002.

41 See Vol. 1, (ed. 2) pp. 125ff.
this Code without exception; provided that he concludes it with a foreigner, the same applies only in case it is not proved that, in contracting, consideration was given to another law.

§ 37. If foreigners enter into transactions abroad with foreigners, or with subjects of this State, they are to be judged according to the laws of the place where the transaction was concluded; provided that in contracting another law has not evidently been taken as a basis.

The Austrian courts also apply whatever they consider imperative rules of their law to any contracts made abroad in which an Austrian participates.\(^42\) Apparently, the principle ordained in status matters that a contract by an Austrian national purporting to cause effects in Austria is governed by Austrian law (§ 4), is sometimes applied to other matters, too.\(^43\)

*Latin America.* In general, it does not appear that party autonomy is entirely denied in Latin America, but according to numerous codes, in certain cases the law of the forum prevails. The Civil Code of Chile (1855) inaugurated this trend by the provision that:

The effects of contracts made abroad and to be performed in Chile are determined by the Chilean laws.\(^44\)

Appearing as the third paragraph of a section dealing with "*bienes,*" that is, probably meaning to indicate immovables,\(^45\) situated in Chile, the provision would seem to refer exclusively to contracts concerning domestic real property, which class of transactions was expressly excepted from party autonomy in the Brazilian Code.\(^46\) Expressly under this nar-

\(^{42}\) *Walker* 409 ns. 5 and 6; *Ehrenzweig-Krainz* § 27 n. 10.

\(^{43}\) OGH. (Jan. 16, 1952) Clunet 1955, 180; OGH. (Jan. 23, 1952) 25 SZ. (1952) No. 17 (guaranty between Austrian parties, concluded in Switzerland, Austrian law); see *Ehrenzweig-Krainz* *ibid.*

\(^{44}\) *Chile: C. C. art. 16 par. 3,* to which provision C. Com. art. 113 expressly refers.

\(^{45}\) On the doubts existing with respect to movables, see *Claro Solar,* 1 *Explicaciones de Derecho Civil Chileno* (1898) 125 § 215.

\(^{46}\) *Brazil: Introd. Law* (1916) art. 13 § único, *sub* III ("transactions relating to immovables situated in Brazil"); *sub* IV ("transactions referring to the Brazilian mortgage system").
rower conception, the provision was adopted in the Codes of Colombia and Ecuador.\(^47\) However, the Codes of Honduras, Panama, and El Salvador have reproduced the entire section without modification.\(^48\) The Supreme Court of Chile\(^49\) not only refers it to all objects but extends the law of the place of performance to the effects of all contracts. A Chilean place of performance would imperatively call for the Chilean law, while a contract to be performed abroad would be susceptible of an agreement in favor of a different law.

This double rule has been adopted in numerous other Latin-American laws, notably in Argentina, Brazil, and Mexico,\(^50\) although only the Brazilian Civil Code of 1916 made it really clear that the parties may choose a law in general, but may not do so if the place of performance is in the country. The Argentine Code contains a maze of mysterious provisions.\(^51\)

The Brazilian Code added the prohibition of an agreement of the parties as to “obligations entered into in a foreign country by Brazilians,”\(^52\) thus achieving four extensive reservations for the *lex fori*. The new Brazilian law, however, has replaced all restrictions to the agreement of the parties by

\(^{47}\) Colombia: C. C. art. 20 par. 3.  
Ecuador: C. C. art. 15 par. 3.  
\(^{48}\) Honduras: C. C. art. 14 par. 3.  
Panama: C. C. art. 6 par. 3.  
El Salvador: C. C. art. 16 par. 3.  
\(^{50}\) Argentina: C. C. art. 1243 (1209).  
Brazil: Introd. Law (1916) art. 13 § único, sub I (“contracts made abroad but to be performed in Brazil”); Introd. Law (1942) art. 9 § 1. On several controversial questions, see 2 Pontes de Miranda 187, 191.  
Mexico: C. C. (1928) art. 13; the former code (1884, art. 17) had expressly allowed transactions made by a foreigner abroad concerning movables to be submitted to another law.  
\(^{51}\) Argentina: Are art. 8 (8) and 1243 (1209) imperative? The answer is difficult because nobody knows which of the many sections involved includes the main principle. See the attempt to disentangle this complex by 3 Vico 122 § 137.  
\(^{52}\) Brazil: C. C. art. 13 § único sub II.
one provision in favor of Brazilian formalities for contracts performable in the country. It would seem that thereby party autonomy is tacitly restored in all questions of substance. The comments, known thus far, proclaim this view, excepting, however, the “imperative” provisions of the law of the place of contracting.\(^{53}\)

Another provision in favor of the domestic law was still more extraordinary. Peru and Guatemala seemed to allow a party agreement exclusively in favor of their own laws; but this may be obsolete.\(^{54}\)

Authoritative writers have, often enough, manifested their dissatisfaction with the described nationalistic tendencies,\(^{55}\) which, however, have never received, as a whole, the public rejection they deserve. To the contrary, the exorbitant theory that the state is entitled to dictate the *lex obligationis* to its subjects has been seriously maintained by a reputed writer.\(^{56}\)

While certain codes omit any provision,\(^{57}\) their silence may appear ominous to the permissibility of agreements on the applicable law, in view of a recent discussion during the deliberation of the new text of Montevideo. The Argentine delegate, Vico, proposed that the intention of the parties be recognized with respect to the effects of contracts, where it is not in contradiction to prohibitions of the law of the place

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\(^{53}\) Brazil: Introd. Law (1942) art. 9; Espinola, 2 Lei Introd. 568; Serpa Lopes, 2 Lei Introd. 316ff.; Tenorio, Lei Introd. 609-613 advocates restriction to the autonomy allowed by the *lex loci contractus*; contra: Serpa Lopes, ibid.

\(^{54}\) Peru: C. C. (1852) art. 40 sent. 2, omitted in C. C. (1936) T’t Prel., art. VII.

Guatemala: The provision of the Law on Foreigners, 1894, art. 16 sentence 2 has been reformed and appears in the Law on Foreigners, 1936, art. 24 sent. 3 restricted to external requisites in case the act or contract is to be performed in the country. However, Matos 453 n. 1 § 327 does not stress or even mention this article.

\(^{55}\) See, among others, recently, Bevilaqua (1938) 368, although he seems (365ff.) to understand the Brazilian rules as mere presumptions; Fulgencio, Synthesis de Direito Internacional Privado (1937) 145 § 299. Contra: Pontes de Miranda 191ff.

\(^{56}\) Pontes de Miranda, 39 Recueil (1932) I at 649.

\(^{57}\) The Código Bustamante is enigmatic. Bustamante, La comisión de juris-consultos de Rio (Habana 1927) 119 § 141 declared that his draft recognized express and tacit intentions of the parties, but his added restrictions are based on the theory of a predestined national law or *lex loci contractus*.
of performance; in other words, he followed the French theory rejecting true party autonomy. To the same effect, the present text of the Treaty was interpreted in the commission, in which, as is reported, the principle “of general and affirmative character triumphed that denies autonomy of intention any legitimacy for setting up a regulatory norm of private international law.” 

The Uruguayan delegate, Vargas Guillemette, proposed a round denial, and in fact, a clause was inserted into the Additional Protocol of the Conference declaring that “jurisdiction and law applicable according to the respective treaties, cannot be modified by the intention of the parties, except to the extent that this law authorizes them so to do.”

It seems that all these formulations amount to the rule that the law of the place of performance or the other laws prescribed in particular cases by the treaty govern the freedom of the parties.

**Other jurisdictions rejecting party autonomy.** According to a very short report, the courts of Denmark and Norway do not recognize choice of law by the parties except within the domestic sphere of the competent law, which, however, does not seem defined with certainty. The same is declared in a section of the Civil Code of the Soviet Union.

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69 República Argentina, Segundo Congreso Sudamericano 211. Literally adopted by the Uruguayan C. C., Final Title (as amended 1941) art. 2403.

66 Conference de la Haye, Actes de la sixième session (1928) 276 (Ussing, Denmark) and 337 (Altén, Norway); Borum and Meyer, 6 Repert. 224 No. 80 (Denmark). *Contra:* now Borum 139, 144; Landø, 6 Am. J. Comp. L. (1957) 1, 3.

61 The question is declared controversial, see Stoupnik, 7 Répert. 114 No. 160; but see Makarov, Précis 300ff. In commercial affairs, choice of law is now recognized, Pisar, 70 Harv. L.R. (1956/57) 593 at 630; Ramzaitsev, Rev. Cr. (1958, 459 at 467.

It may be noted, however, that several treaties on the legal position of Soviet trade delegations abroad state that the rule according to which contracts with the delegation are governed by the law of the place of contracting, may be changed by the terms of individual contracts, see, e.g., Treaty on Commerce and Navigation with Denmark of August 17, 1946, (8 U.N. Treaty Series 201) Annex, art. 6 par. 2; with Hungary of July 15, 1947 (Economic Treaties and Agreements of the Soviet Bloc in Eastern Europe 1945-1951. Ed. 2, New York 1952) Annex, art. 5 par. 2; with France of September 3, 1951 (Revue Crit. 1953, 170) art. 10 par. 2.
Czechoslovakian statute of 1948 and the Benelux-Draft recognize party autonomy insofar as it does not abrogate imperative rules of the “competent” law.\textsuperscript{61a}

2. United States

Until recently, the opinion dominant among the European scholars was fully shared by the leading American writers.\textsuperscript{62} The most radical form of this doctrine, denying not only desirability but existence to a choice of law by the parties, has been adopted by Beale and is evident in the perfect silence of the Restatement on everything connected with party autonomy.

A few, very few, cases, reflecting this principle denying party autonomy, are best represented by Judge Learned Hand’s formulation:

“People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one’s bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.”\textsuperscript{63}

Textbooks and encyclopedias, however, readily admit that regard to the intention of the parties is one of the approaches which an American court may use.\textsuperscript{64} Beale himself recorded in 1910 as in 1934 that it appeared in the second most

\textsuperscript{61a} Czechoslovakia: Law of 1948 on private international law, § 9.

Benelux-Draft, art. 17 par. 1 sentence 2.

\textsuperscript{62} In addition to Beale: Lorenzen, 30 Yale L. J. (1921) 655 and passim; Goodrich 326; previously Foote 397; Minor 401. See Cook, Legal Bases 389.

\textsuperscript{63} Gerli & Co., Inc. v. Cunard S. S. Co., Ltd. (C.C.A. 2d 1931) 48 F. (2d) 115, 117; accord, Commissioner of Internal Revenue v. Hyde (C.C.A. 2d 1936) 82 F. (2d) 174. In both cases the decision was not dependent on the dictum.

\textsuperscript{64} Stumberg 225, 234.
CHOICE OF LAW BY THE PARTIES

numerous group of cases. The Supreme Court of the United States has most frequently followed this theory, starting from a dictum by Chief Justice Marshall in 1825, and has purposefully remarked that this is the general rule "concisely and exactly stated before the Declaration of Independence by Lord Mansfield." It has been said that:

"The situs of contracts is one of the troublesome problems of private international law, but one rule stands forth clearly: That the intention of the parties as to the law they desired to apply will govern, if such selection be made in good faith, and be not opposed to the public policy of the forum."

The courts of New York have clearly followed the same view. In 1935, the New York court of last resort has explicitly restated the principle:

"The intention of the parties, express or implied, generally determines the law that governs a contract."

However, the courts, compelled to find their way against the hostility of the leading scholars, have been increasingly prone to indecision and inconsistency. The doubts whether parties may determine their law at all, may have been augmented by Beale's influence, although they do not seem to have taken strong roots. Also, the unreasonable belief that parties can choose only between the law of the place of contracting and that of the place of performance, seems to

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66 Beale, 23 Harv. L. Rev. (1910) 266; 2 Beale 1172 still mentions 13 states, as against 21 states allegedly following the lex loci contractus, but see infra Chapter 30, p. 453.
66 See Stumberg 234 n. 42; Lorenzen, 30 Yale L. J. (1921) at 579; Nussbaum, 51 Yale L. J. (1942) at 919.
68 Mr. Justice Gray in Liverpool and Great Western Steam Co. v. Phenix Ins. Co. (1888) 129 U. S. 397, 447.
70 Compañía de Inversiones Internacionales v. Industrial Mortgage Bank of Finland (1935) 269 N. Y. 22, 26, 198 N. E. 617.
have increased as an effect of Beale's teaching. The confusion of the cases, so often deplored, would have been relieved in part, if the courts had always been told in no uncertain words that it is not at all in their discretion and free decision to apply a law which the parties agreed to apply. The most recent writers have claimed the theory of intention to be existent in all American courts. It should be so in any case, and this would give, as Cook has said, as much security as the rules of the Restatement.

3. Express Agreements

Stipulations concerning the law applicable to a contract are not so rare as some writers believe. Of course, compared to the constant flow of millions of interstate and international transactions, a small percentage are provided with appropriate clauses. But world commerce, advised by trade organizations and counsel, has been using such stipulations in ever increasing types of contracts. It is true, the trend is much less strong in the United States, a fact obviously connected with the prevalence of interstate commerce based on federal statutes and a critical attitude of courts. The British standard forms with their reference to English law and London arbitration have aroused countermeasures in the United States as well as in Central Europe. Also, it happens that the arbitration clauses in their large progress are powerful competitors, since they tend toward decisions discarding legal considerations. Arbitrators of the type of "amiable compositeurs" or "de facto arbitrators," have no duty to observe rules of law, and where there is such duty, frequently no sanction is stated.

71 According to Lee, "Conflict of Laws relating to Installment Sales," 41 Mich. L. Rev. (1942) 445, 468, most courts share in this belief. This may be doubted, however.

72 See (in various limitations) Cook, Legal Bases 418; Batiffol 31 §§ 36-38; id. 58 §§ 63-68; Nussbaum, 51 Yale L. J. (1942) 919. Cf. infra Chapter 29 p. 405 n. 46.

The situation is different in England, some British dominions, and some American states, where the courts retain a considerable function, and to some extent in other countries in which arbitrators are presumed to apply the local state law. But growing opposition to the arbitrariness of lawless arbitration on legally material questions ought to bring express stipulations on the applicable law to renewed significance.

Traders of bulk merchandise have used for many decades standard forms influenced by British habits and institutions. Thus, in the grain trade from America to Europe, the La Plata Grain Contract of the London Corn Trade Association subjects the parties to London arbitration and English law. A frequent clause providing in lengthy caution for the determination of arbitration suits, began with the following words:

"Buyer and seller agree that, for the purpose of proceedings, either legal or by arbitration, this contract shall be deemed to have been made in England and to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding, and the Courts of England or Arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the Arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England whatever the domicile, residence, or place of business of the parties to this contract may be or become...."

In another, apparently now prevailing, form, only arbitration is stipulated:

"All disputes from time to time arising out of this contract shall be referred to two Arbitrators... or to an Umpire...."

"All Arbitrators shall be governed by the provision of the

74 For all details, see the instructive article by E. Cohn, "Commercial Arbitration and the Rules of Law, A Comparative Study," 4 U. of Toronto L. J. (1941) 1.

75 See for a list of German, French and Italian cases dealing with this form, Haudek 102 n. 1.
Arbitration Act for the time being in force in England, except so far as the same may be modified by or be inconsistent with the foregoing provisions."

"The Arbitrators or Umpire appointed shall, in all cases, reside in the United Kingdom, and at the time of their appointment shall be themselves members of the London Corn Trade Association Ltd. . . ."

In a comparable way, brokers of any place will in certain contracts with customers refer to the rules of the exchange and the law of the state where the order is to be executed. For instance:

"All orders executed in New York or any New York Stock Exchange or Curb Exchange shall be executed in accordance with the laws of New York and the rules and regulations of the said exchanges prohibiting fictitious and illegal transactions, contracts and agreements, and it is understood and agreed that the validity of all transactions . . . executed on any New York Stock Exchange or New York Curb Exchange shall be controlled and determined solely by the laws of New York."

References to English law are to be found also in the contract forms of the London Rubber Trade Association, Incorporated Oil Seed Association, London Rice Brokers Association, London Copra Association, London Cattle Food Trade Association, Liverpool Cotton Association, and references to German law in the general conditions of such organizations as those of the German carriers and maritime

76 La Plata Grain Contract, form No. 41. Parcels for Continent. Rye Terms. (March 1938) clause 11 (excerpt). In the so-called North American contracts, certificates of inspection being declared final as to quality, the disputes subject to arbitration are such as might arise from other causes than quality of the shipment. See Department of Commerce, Bureau of Foreign and Domestic Commerce, General Legal Bulletin of March 28, 1936, 7.

77 Used by a Boston broker and declared valid in Weisberg v. Hunt (1921) 239 Mass. 190, 198, 131 N. E. 471, 474. See also Cisler v. Ray (1931) 82 Cal. Dec. 396, 2 Pac. (2d) 987, annotated in 20 Cal. L. Rev. (1932) 97: subjection "to the rules, regulations and customs of the exchange or market (and its clearing house, if any) where executed."

insurers. Moreover, particular banks, underwriters, maritime carriers, and certain large merchants have stipulated for their own law by stereotyped clauses in Germany, and probably in many countries. Passenger tickets of British ships, bills of lading regarding vessels leaving English, Dutch, and Belgian ports for America have been traditionally referred to "the common law of England, to wit, general maritime law," or to British law. More recently, it seems more usual to declare that the contract shall be governed by the law of the flag of the ship carrying the goods.

In maritime insurance policies, reference has often been made to the English Insurance Act of 1906 and the conditions and usages of English Lloyd policies. A clause in a contract between two Dutch companies "as if the policy were signed in London," has been treated as an express reference to English law by the Appeal Court of the Hague.

Aircraft transport consignments regularly provide for the national law of the carrier, insofar as international conven-
CONTRACTS IN GENERAL

TIONS DO NOT YET REGULATE LIABILITIES. INTERNATIONAL LOANS HAVE OFTEN CONTAINED \(^{86}\) BUT SOMETIMES OMITTED A CLAUSE ASCERTAINING THE APPLICABLE LAW, AND DRAFTERS WILL PROBABLY BE EXPERIENCED ENOUGH, BY NOW, NOT TO FORGET ONE. THE SAME IS TRUE FOR AGREEMENTS BETWEEN BANKS. \(^{87}\) IN MANY AMERICAN CONTRACTS OF FINANCE CORPORATIONS, INSURANCE POLICIES, AND OTHER AGREEMENTS, \(^{88}\) THE PLACE OF THE MAIN OFFICE OF THE COMPANY IS INDICATED AS THE PLACE WHERE THE CONTRACT IS MADE, FREQUENTLY WITH THE EXPRESS ADDITION THAT THE LAW OF THIS PLACE SHALL GOVERN. THIS IS A TRIBUTE PAID TO THE HISTORICAL ROLE OF THE *LEX LOCI CONTRACTUS*. AGAIN, TO COMPLY WITH THE IDEA THAT THE PLACE OF PERFORMANCE GOVERNS THE CONTRACT, IN GERMAN FORM BLANKS OR GENERAL CONDITIONS, PRODUCERS AND SELLERS ALMOST INVARIABLY STATE THAT "PLACE OF PERFORMANCE AND EXCLUSIVE JURISDICTION" ARE TO BE AT THEIR OWN DOMICIL. \(^{89}\) THIS CLAUSE IS REGULARLY REGarded AS IF THE LAW OF THIS PLACE WERE EXPRESSLY STIPULATED. \(^{90}\) ALTHOUGH FOREIGN EXCLUSIVE JURISDICTION IS NOT EASILY

86 See for list of judicial cases, Haudek 105 n. 1.
87 See for an example, Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag (1943) [1944] Ch. D. 13.
88 E.g., oil lease, Williston, 7 Contracts 5791; Montreal Cotton & Wool Waste Co. v. Fidelity & Deposit Co. of Maryland (1927) 261 Mass. 385 (sale of goods). Conditional sales contract, Rubin v. Gallagher (1940) 294 Mich. 124, 292 N. W. 584 (the court recognizes a subjective right created by the clauses); Stern v. Drew (App. D. C. 1922) 285 F. 925; Craig & Co., Ltd. v. Uncas Paper Board Co. (1926) 104 Conn. 559, 133 Atl. 673, in which cases the clause has been discarded by the court and by Lee, *supra* n. 71, at 471.
89 "Smaller enterprises and firms with widespread patronage usually provide at least for exclusive jurisdiction to be at the place of their management; in the industry and big trade it is very common to exclude in the general conditions state jurisdiction in favor of private arbitration." Raiser, Das Recht der allgemeinen Geschäftsbedingungen (1935) 41. The Industry and Commerce Chamber in Berlin, however, advised not to use any clauses modifying the legal provisions on the place of performance and jurisdiction, see Rühl, Juristischer Anschauungsstoff, Heft 1 (1931) 20.

The custom is widespread. For instance, in a contract between an American and a Danish firm, the stipulation that the place of performance and of jurisdiction should be in London, was recognized by the Admiralty and Commercial Tribunal in Copenhagen (Dec. 20, 1938) Ugskrift for Retsvæsen 1939, 238, 41 Bull. Inst. Int. (1939) 52 No. 10762.

90 Usage of merchants and practice of the courts are comprehensively treated in Leonhard, Erfüllungsort und Schuldort, 166ff.; id. 183ff. Of course, the clause may intend only advantages of private and procedural law, Staub-Heinichen in 3 Staub 547, Anhang zu § 372 n. 6a.
conceded by American and many other courts in suits of residents against nonresidents, agreement on a law in the form of determining the place of making or performance should be respected on principle. Certainly, it should also be out of question to invalidate the American clause determining the place of contracting as fictitious, as eminent judges have occasionally done. 91 An English court had no difficulty in enforcing the following clause in a contract made in New York between a citizen of Ecuador, who never had an English domicile, and a Canadian company, respecting certain mineral rights in Ecuador:

"While for convenience this agreement is signed by the parties in the City of New York, United States, it shall be considered and held to be one duly made and executed in London, England." 92

American life insurance companies doing business in Europe have been compelled to settle for the jurisdiction and law of the country of their branch. 93

In ordinary American business agreements extending over several states, stipulations determining the applicable law are by far not so frequent as they should be. But remarkable

91 Especially Mr. Justice Brandeis, dissenting in New York Life Ins. Co. v. Dodge (1918) 246 U. S. 357.
Similarly, the Supreme Court of Italy, Cass. (July 26, 1929) Rivista 1931, 406.
To the contrary effect, e.g., England: British Controlled Oilfields v. Stagg (1921) 66 Sol. J. 18.
France: Cass. (req.) (Aug. 6, 1867) D. 1868.1.35, S. 1867.1.400 and constantly, see Batiffol 43 n. 1.


93 Thus Czarist Russia prescribed submitting of insurance policies issued in Russia to Russian law. After the intervention of the Soviet decrees affecting the insurance contracts, two conflicting decisions of the New York Court of Appeals resulted, namely, Sliosberg v. New York Life Ins. Co. (1927) 244 N. Y. 482, 155 N. E. 749, and Dougherty v. Equitable Life Assurance Society (1934) 266 N. Y. 71, 193 N. E. 897. In the first case the court disregarded, in the second case the majority of the court, against the vote of Judge Lehman, respected, the stipulation of submission to the Russian law required by the Russian statute, cf. Note, 88 U. of Pa. L. Rev. (1940) at 986. However, the problem of the cases was the situs of the obligation rather than the applicable law; cf. Rabel, "Situs Problems in Enemy Property Measures," 11 Law and Cont. Probl. (1945) 118, 131.
negative references occur, a kind of clausulae salvatoriae, to save as much of the contract as the various statutes possibly involved may allow. Thus, in combination with a general reference to the law of Michigan, contracts of the Detroit automobile industry, with its many thousands of dealers in the world, state that any provisions contravening the laws of any country, state, or jurisdiction shall be deemed not a part of the agreement. In conditional sales contracts, clauses are to be found such as follow:

“If the law of Tennessee [where the contract is made] does not apply to and govern the contract between the parties, their rights and remedies, then the laws of Ohio or Arkansas apply.”

“It is the express intention of the parties hereto that this agreement and all the terms hereof shall be in conformity with the laws of any state wherein this agreement may be sought to be enforced, and if it should appear that any of the terms hereof are in conflict with any rule of law or statutory provision of any such state, then the terms hereof which may conflict therewith shall be deemed inoperative and null and void insofar as they may be in conflict therewith, and shall be deemed modified to conform to such rule of law.”

By an analogous method, an automobile policy provides that:

“Any and all provisions of this policy which are in conflict with the statutes of the state wherein this policy is issued are understood, declared, and acknowledged by this company to be amended to conform to such statutes.”

94 Stevenson v. Lima Locomotive Works (1943) 180 Tenn. 137, 172 S. W. (2d) 812, recognizing these clauses and apparently inferring the intention of the parties that the state of enforcement should furnish the applicable law; the decision is understood to this effect also in the Note, 148 A. L. R. (1944) 375, 376.


95 Form used by Central Mutual Ins. Co. of Chicago and procured for me by the kindness of Att. Edgar H. Ailes, Jr., Detroit. The stipulation continues to the effect that nevertheless the liability of the company should not be increased but the assured should reimburse the company for any loss, costs, or expenses exceeding the scope of the policy. A similar clause is concerned with the exigencies of the
and that:

"Any stipulation therein in conflict with or contrary to the laws of the state or province (of Canada) where the liability arises shall be considered as not written, and the law of such forum shall apply."

and moreover:

"If any condition of this policy relating to the limitation of time for notice of accident or for any legal proceeding is at variance with any specific statutory provision in the State in which the accident occurs, such specific statutory provision shall be substituted for such condition."

A company appointing a branch manager usually inserts in the employment contract a clause restraining him from engaging in the particular trade during a certain period after the termination of the contract. Such clause may expressly refer for construction to the law of the place of performance, meaning the state in which the branch is situated, because the legality of the clause would presumably be judged by the courts according to this law.

The most notable similar clause in the international field was introduced to safeguard maritime affreightment contracts against the danger of contravening the American Harter Act. At present an analogous so-called "clause paramount" is ordered by many enactments in connection with the Hague Rules to be inserted in bills of lading and in addition often voluntarily adopted. The clause states that the contract of transportation shall be subject to the Convention of Brussels of 1924 that sanctioned the Hague Rules, or to a sea carriage Motor Vehicle Financial Responsibility Law of the state or province in which the policy is (eventually deemed to be) issued.

97 Form drafted by Mr. Thomas G. Long in Detroit.
98 See infra Chapter 29, p. 426 n. 135.
of goods act embodying these Rules, and that any contrary stipulation shall be null and void. The clause is "paramount" to all other stipulations.\footnote{For the interesting particulars, see the informative article in Revue Dro} 

During war times, the United States Government in contracts with firms undertaking comprehensive works, often assumed its direct liability for the obligations undertaken by the contractor to a subcontractor in a subcontract made by him; to secure the subcontractor independent rights as a beneficiary in all courts, this agreement is declared to be governed by the laws of the District of Columbia.\footnote{For this information, too, I am indebted to Mr. Thomas G. Long. The situation existing without such a clause has been described by Graske, War Contract Claims (Williston, 9 Contracts, 1945) \S 172.} 

On principle, despite Beale, there cannot be the slightest doubt that all the mentioned agreements are held valid in all countries, including the United States, with the possible exception of a few Latin-American jurisdictions. The courts recognize reference to sister states as well as to foreign countries.\footnote{For instance, Italian law: Mittenhal v. Mascagni (1903) 183 Mass. 19, 66 N. E. 425. Canada: M. A. Kennedy v. Fiat of Turin (1923) 24 O. W. N. 537: "all controversies shall be referred to the Turin Law Court to be dealt with according to Italian law."} 

4. Implied Agreements 

Parties agree tacitly to the application of a particular law when their behavior shows their obligations to be intentionally connected with the private law of a certain country. If they have only a law "in mind" but do not express their intention at least by conduct, there is no case for a tacit stipulation. But, for instance, parties having in their former transactions agreed on the application of a certain law, may well be supposed to intend a similar submission in making a new contract.
In addition to the cases of international loans and sales, another typical example free from doubt is a transaction at a stock or commodity exchange. Every participant knowingly submits himself to the regulations and usages of the exchange as well as to the state law in force at the place. Even an order to a broker in Zürich, to be performed at the local exchange, has been considered an intentional subjection to the usages of Zürich and to Swiss law. 103

Assuredly, the borderline between tacit and presumed intention is often dubious. Where the parties by agreement submit to the jurisdiction of a certain country, some decisions have taken for granted that the agreement extended to the municipal law of that country. 104 The English House of Lords declared this inference so sure that no one could doubt. 105 Others, more cautiously, only infer a presumable intention to submit to this law. 106 But it seems settled that the court or board of arbitration to which the parties have submitted, would apply, if not its own municipal law, certainly its own conflicts rules. 107

In the English courts, also a clause of submission to English arbitrators is regularly deemed to imply reference to English law. 108 Analogous inferences, although with more

103 Switzerland: BG. (Oct. 21, 1942) 68 BGE. II 220; but this is a controversial matter.
104 Germany: RG. (Feb. 22, 1881) 4 RGZ. 242 and in constant practice; see also IPRspr. 1926-27 No. 3; 1931, 63, 78; 1933, 19, 40; Bay.ObLG. (May 16, 1934) IPRspr. 1934. 44.
106 Canada: See 3 Johnson 449.
Switzerland: BG. (Sept. 18, 1934) 60 BGE. II at 302 and precedents cited; cf. (June 9, 1936) 62 BGE. II 125.
dependence on the circumstances, occur elsewhere.\textsuperscript{109} Arbitration, however, in this country\textsuperscript{110} and in many others, at present very often entails decisions without reference to any particular private law. But such a clause has been said to influence conflicts law by excluding the ordinarily applicable law.\textsuperscript{111}

Much discussion has been devoted in Switzerland to the case where both parties in court plead application of a certain law to the litigious contract. Can the parties agree on choice of law even as late as in court? Party autonomy can hardly be pushed so far, except where there is a clear-cut new contract modifying their relation.\textsuperscript{112} However, the Swiss Federal Tribunal previously was inclined to consider statements of counsel on the applicable law as a conclusive argument for a tacit agreement in contracting.\textsuperscript{113} At present, the Swiss and German highest courts regard such statements only as one among other clues for assuming a hypothetical intention.\textsuperscript{114} Quite recently, the Swiss Federal Tribunal has again reversed its viewpoint; express and even tacit agreements in

\textsuperscript{109} Germany: RG. (June 19, 1906) JW. 1906, 452; (July 8, 1913) Hans. GZ. 1913, 282 and others.
France: See conclusions by BATIFFOL § 152.
Contra: Germany: RG. (Oct. 14, 1913) Warn.Rspr. 1914, 42; (Nov. 19, 1929) JW. 1930, 1862; (June 10, 1933) IPRspr. 1933, 44.
Contra: The Netherlands: Hof s'Gravenhage (Feb. 10, 1911) W.9161; Rb. Amsterdam (March 3, 1911) W.9208.
The great majority of governments, in their answers concerning the sales of goods (Sixième Conférence de la Haye, Documents 460), denied that even in the intention of the parties the designation of arbiters was in strict connection with the application of the national law of the arbiters.

\textsuperscript{110} WILLISTON, 6 Contracts § 1924; ISAACS, "Two Views of Commercial Arbitration," 40 Harv. L. Rev. (1927) 929, 937.


\textsuperscript{112} Cf. BG. (June 9, 1936) 62 BGE. II 125, denying any force even to a novatory agreement, if not foreseen in the contract; German OLG. Hamburg (Oct. 21, 1901) 11 Z.int.R. 443 regarded the party disposition binding on the court.


\textsuperscript{114} 49 BGE. II 225; 62 id. II 125; 63 id. II 307; RG. (April 4, 1928) IPRspr. 1929 No. 31; RG. (April 27, 1932) 86 Seuff. Arch. 299, IPRspr. 1932 No. 32; RG. (June 10, 1933) 151 RGZ. 193, 199.
court on the applicable law are held conclusive. That the Mixed Arbitral Tribunals were only too glad to encounter consonant declarations of the parties permitting them to avoid entanglement with two or more conflicts laws, is well understandable. It seems that most courts believe themselves to be entitled to accept the pleading of both parties based on the law of the forum, without further investigation. This may be legitimate when it conforms to the procedural rules, which is not self-evident. Foreign law is not really a mere fact.

In conclusion, agreements on the applicable law, made otherwise than by words, are not very frequent, but should by no means be overlooked in the search for the applicable law.

5. Scope of the Agreement

(a) Problem of renvoi. There seems to be general agreement that parties stipulating for an applicable law intend to apply the municipal law without renvoi.

(b) Nullity by choice of law. Some adversaries of party autonomy have ridiculed the consequence that a contract should be void because the law referred to by the parties prohibits it. Savigny countered this objection by suggesting that the reference should be construed as not meant to include the provisions that would nullify the contract. However, nullity in this case is a sound and natural consequence of the rule, as well as of the more or less considered will of

114a BG. (Aug. 31, 1953) 79 BGE. II 295 (express agreement); BG. (May 26, 1954) 80 BGE. II 179 (tacit agreement by not invoking foreign law).


118 E.g., Recueil trib. arb. mixtes: Vol. 4, 360, 520, 534, 627; Vol. 5, 563.


United States: Siegelman v. Cunard White Star, Ltd. (1955) 221 F. (2d) 189, 194; dissenting Judge Frank invokes a dictum of Lord Wright in Vita Food Products Co., Inc. v. Unus Shipping Co., Ltd. [1939] A.C. 277 (P. C.) which, however, never was followed and has been sharply criticized, see SHARWOOD, "Renvoi and Contractual Choice of Law," 5 Am. J. Comp. Law (1956) 120-125; cf. also MELCHIOR 238.

117 SAVIGNY § 374.
the parties concerned, and this is the victorious opinion.\textsuperscript{118}

IV. Choice of Several Laws

1. Special References

The economic interests of parties to a contract sometimes require that certain phases of their relation should be governed by particular laws, as when, for instance, examination of goods sold is subjected to the local law of the place where the goods arrive for inspection.\textsuperscript{119} Accordingly, it is well settled also that the parties may refer a part of the contract to a specific law different from that governing the rest of the contract.\textsuperscript{120} As choice of law is a matter of agreement, the Supreme Court of the United States says, "the agreement may select laws and also limit the extent of their applicability."\textsuperscript{121}

Contractual provisions for a certain law, virtually different

\textsuperscript{118} England: See \textit{Bentwich} in \textit{Westlake} 303-304.
Germany: RG. (May 10, 1884) 12 RGZ. 34 rejected Savigny's opinion, no presumption of submission being required; OLG. Braunschweig (Feb. 7, 1908) 13 ROLG. 362.
France: "Less characteristic, but the possibility of annulling a contract even in case of conflict of laws is clearly admitted," \textit{Batiffol} 51 n. 1.
The Netherlands: Hof Haag (May 17, 1923) W.I1171: marine insurance having reference to English law; the clause that the policy should be the only evidence of the interest, makes the contract invalid under the Life Assurance Act, 1774, and Marine Insurance Act, 1906, s. 4 (2-b).

\textsuperscript{119} \textit{Cf. Bagge}, Recueil 1928 V at 167.
\textsuperscript{120} England: \textit{Dicey} 720, 728; \textit{Cheshire} 242; Adelaide Electric Supply Co. v. Prudential Assurance Co. [1934] A. C. 122, 145, 151; Hamlyn v. Talisker, Kwik Hoo Tong v. Finlay, see \textit{supra} n. 108.
Germany: RG. (June 23, 1927) 118 RGZ. 370, 374; (Nov. 14, 1929) 126 RGZ. 196, 206; obiter dictum 122 RGZ. 316.
Italy: Cass. (Nov. 28, 1927) and (Jan. 21, 1928) Giur. Ital. 1928 I 647, Rivista 1928, 514, 4 Z. ausl. PR. (1930) 587.
Perm. Court of Int. Justice (July 12, 1929) Series A, Nos. 20, 21; Clunet 1929, 977.
Benelux-Draft, art. 17 par. 1 sentence 1.

\textsuperscript{121} Mutual Life Ins. Co. v. Hill (1904) 193 U. S. 551, per Mr. Justice Brewer; literally followed in Mutual Reserve Fund Life Ass'n v. Minehart (Ark. 1904) 83 S. W. 323.
from that intended for the contract in general, are frequent in such matters as mode of performance and particularly currency questions, exemption from liability of common carriers by reference to section 3 of the Harter Act or similar laws, reference to the Antwerp York rules for general average in maritime contracts, or clauses concerning land securities to be subject to the *lex situs*.

A series of disputes has arisen about the scope of these references, because of the widespread indifference with which standard contract forms used in interstate and international commerce often contain inconsistent mixtures of old and new clauses. Thus, American insurance policies, for instance, have referred to the law of New York to control the contract generally and in another clause stated a waiver by the insured of notice preliminary to forfeiture, although New York law unconditionally prescribes the notice. In such a case, the Supreme Court of the United States has construed the general reference as restricted by the special clause; the law of New York could not extend its imperative force to a contract made in another state and subjected to this law only by stipulation.122

Similar combinations in bills of lading or affreightment contracts have been decided in an analogous manner, when feasible.123 Reference to the Harter Act has been held in Germany to be restricted by a simultaneous broad exemption clause based on German law.124 In a charter party made in

122 Mutual Life v. Hill, *supra* n. 121.
123 In *Ocean Steamship Co. v. Queensland State Wheat Board*[1941] 1 K. B. 402, the bill of lading contained two clauses, the first referring to the Australian Sea Carriage of Goods Act, 1924 (instead of the provisions of the schedule only) and declaring anything inconsistent null and void, and a second subjecting the contract to the law of England. The second clause was held void because s. 9 of the Australian Act provided that the parties would be deemed to have intended to contract according to the law in force at the place of shipment and any stipulation or agreement to the contrary should be null and void.
124 OLG. Hamburg (July 7, 1905) Hans. GZ. 1905, 227; (July 5, 1907) Hans. GZ. 1907, 244. In another case where the “Holland clause” (referring to Dutch Law) was inserted, it was declared compatible with the added exemption clause, OLG. Hamburg (Feb. 12, 1936) Hans. RGZ. 1936 B 243 No. 70.
New York and expressly subjected to American law, the parties inserted a clause exonerating the shipowner from liability for negligence, contrary to the Harter Act, but valid under French law obtaining at the port of discharge in Guadeloupe. The Court of Cassation in Paris recognized the exemption as valid under the assumption that the parties intended to submit themselves to French law known by them as validating the clause.\textsuperscript{125} It would have been simpler to admit that the special stipulation limited the general reference.\textsuperscript{126} This argument was used, in fact, by the Appeal Court of Brussels when general reference to English law conflicted with an express reference to the Canadian Water Carriage of Goods Act, corresponding with the Harter Act.\textsuperscript{127}

It might be argued, however, that the Hague Rules, now replacing the just-mentioned laws and adopted in the most important countries, require a stricter application. So far as they reach, they exclude party autonomy. Stipulations in the bill of lading inconsistent with the Rules may be generally understood as nullified.

A Dutch marine policy referred to the English Marine Insurance Act, 1906, and the conditions and usages of Lloyd policies "as if the policy had been signed in London," but contained a clause that payment would be due without further proof of interest than the policy itself, which clause would have made the insurance contract void under the English Act. The Supreme Court of the Netherlands decided that the reference to English law was restricted by the clause, basing this clause on Dutch law.\textsuperscript{128}

The same view has sometimes been taken with regard to loan debentures under which amounts are due at one of several places, at the option of the bondholder, in the money


\textsuperscript{126} See also Batiffol 67 n. 3.


\textsuperscript{128} H. R. (June 13, 1924) N. J. (1924) 859, 1 Van Hasselet 206.
of the place, the parties agreeing that the law of the country selected by the bondholder should determine the amount and method of payment. In this view, American law governing the currency of payment in New York should be construed as an exception, for example, to English law determining other phases of the obligation.129

2. Nature of Special References

Courts of various countries examining the scope of special references, often assert that they have to construe agreements only, not laws. Lord Esher said: "the parties introduce the words of the Harter Act which I decline to construe as an Act but which we must construe simply as words occurring in this bill of lading."130 The language of American judges131 and foreign courts132 is sometimes similar. Evidently, in this connection, there is no question of a reference to foreign law valid only when it merely embodies words of foreign laws in the contractual stipulations.133 But does this kind of expression yet acknowledge a difference between reference to foreign law on the basis of conflicts law and a mere transformation of foreign law into ordinary stipulations? German scholars, in fact, have stressed this alleged difference and, although recognizing both types of reference as binding, have preferred to presume that the law generally governing a contract

129 This has been contended in criticizing the House of Lords decision in Rex v. International Trustee etc. [1937] A. C. 500, by the anonymous writer in 18 Brit. Year Book Int. Law (1937) 220.
131 See, e.g., Mutual Reserve Fund Life Ass'n v. Minehart (Ark. 1904) 83 S. W. 323: reference to New York law does not mean that the statutes of New York are in force but only that they are a part of the contract. See also the language of Cook, Legal Bases 399.
133 Supra p. 362.
extends to these stipulations, because this interpretation promotes the unity of law governing a contract.\textsuperscript{134} Admittedly, however, average parties are not at all aware of this subtle contrast, nor are the courts prepared to observe it.\textsuperscript{135} They, definitely, presuppose a plurality of laws whose borderline only needs analysis. By the above language, the courts seek to emphasize only that the scope intended by the specially invoked law is not binding, even though it is intended to be compulsory; that the court is free to assume to what extent the parties have referred their obligations to that law; that the reference is to be reasonably interpreted and restricted.\textsuperscript{136}

If the courts were to follow the suggestion mentioned they would have to favor the more general reference at the cost of the special clause. But the judicial inclination is just to the contrary. Courts profess that the special clause derogates from the general one.

In addition, a mere incorporation of a foreign rule in stipulations would have the result that, if the rule is changed subsequent to the contract, the obligation would not be affected. This, as said earlier, is an undesirable effect.

But it may be asked, instead, whether parties are permitted, if they so intend, to limit the reference to the unchanged text of a certain legal rule. The question came up on the occasion of the American loans in the nineteen-twenties

\textsuperscript{134} See Haudek 38; Melchior 523 § 384; Wolff, IPR. (ed. 1) 88. This view seems to be shared by Kahn-Freund, Annual Survey of English Law (1940) 254. For a different distinction, which I believe to be the correct one, see infra Chapter 32, II, 3, p. 534.

\textsuperscript{135} In RG. (Nov. 24, 1928) 122 RGZ. 316 cited by Melchior 522 n. 3 for his thesis, the court expressly stated that a particular stipulation may be subject to a separate law. This was not altered by the correct decision in the case at bar that the litigious question of who has to bear extraordinary costs in a sea carriage, was covered by the main reference to English law. In RG. (Nov. 14, 1929) 126 RGZ. 196, 206 (cited by Melchior 522 n. 4) it was stated that the presumptive intention of the parties, decisive according to German, not the Austrian, conflicts law, excluded the Austrian law from the question of effects exercised by Austrian decrees.

\textsuperscript{136} See e.g., Mutual Life Insurance Co. v. Hill, supra n. 121, at 557: "... the laws of New York are controlling in any respect only because the parties have so stipulated, and, as we have indicated, the stipulation in respect thereto is to be harmonized with the other stipulations in the contract."
to European governments, cities, and corporations. Interest and capital were payable in gold dollars. When by the Joint Resolution of Congress in 1933 recovery in gold coins as well as in gold value was prohibited, bondholders attempted to save their claims by contending that a reference made in the contract debenture, and possibly in the bond, to the law of New York, was not intended to include the unforeseeable American dollar depreciation. The German Reichsgericht replied that "one cannot select a national law and exclude its imperative rules. Only an unrestricted submission assures that the contract be disciplined, if necessary, against egoistic purposes of the economically stronger party or even both parties, considering the general interests in changing times...." 187

There was no doubt about the correct interpretation of the individual loan agreements. None of them could be understood otherwise than as taking the Joint Resolution in its stride, since the alternative would have been the complete lack of an applicable law, an impossible result. 188 In theory, however, the problem of conditional references to a legal rule is new and unsettled. 189

187 RG. (May 28, 1936) JW. 1936, 2058; cf. 10 Z.ausl.PR. (1936) 385.
188 RABEL, 10 Z.ausl.PR. (1936) 509, 513.
189 For the negative solution, see WOLFF, 49 Jurid. Rev. (1937) at 124; for the affirmative, NUSSBAUM, "Comparative and International Aspects of American Gold-Clause Abrogation," 44 Yale L. J. (1935) at 83; for reasons of doubting, DUDEN, 9 Z.ausl.PR. (1935) 625.