Chapter 30

Rules in Absence of Party Agreement

A. Judicial Choice of Law

I. Individualized Choice of Law

1. Presumed Intention of the Parties

According to their basic proper law theory, English courts, in the absence of an agreement of the parties, will analyze the stipulations and circumstances of a contract, to ascertain the law the parties had "in mind," "in view," "in contemplation," "upon which they acted." This method taken at its face value presupposes that there was a certain law in the background of the negotiations, although the parties did not even tacitly adopt it. Such things happen. When, for instance, an irrevocable power of attorney was declared to be granted in a document executed in New York, by a resident to another resident, for the purpose of cashing the debt of a German debtor, the natural assumption was that New York law should determine whether the power could be revoked, although as a rule authority of an agent is governed by the law of the place where he acts.1 The intention presumed here is implied rather than merely supposed and may be closely associated to the cases of agreement by conduct.2

Usually, however, the parties do not even realize that there may be a question of the applicable law. In this vast majority of cases, the task of the courts is more adequately defined by the question which law the parties probably would

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1 German RG. (Oct. 24, 1892) 30 RGZ. 122; see RABEL, 7 Z. ausl. PR. (1934) 807.
2 Cf. loan debentures of New York banks, see supra p. 369.
have chosen if they had been conscious of the conflicts problem — their so-called "hypothetical intention," formulated as:

"The intention which would have been formed by sensible persons in the position of X and A if their attention had been directed to contingencies which escaped their notice" (Dicey); ³

"What the parties would have determined in reasonable and fair consideration of all circumstances" (the German Reichsgericht); ⁴

"The law which the parties reasonably could and should have expected to be applied"; ⁵ or "the law which the parties would have declared applicable if they had thought at all of stipulating on the question" (the Swiss Federal Tribunal); ⁶

The law upon which the parties "might be supposed instinctively to rely," the variant of a judge of the High Court of Australia, aptly explaining the net result of the English rule.⁷

This has been the usual approach of all European courts during the last century, and in part until today.

The inquiry of the court, thus postulated, is essentially concerned with each individual contract. The choice of law is "a matter of construction of the contract itself, as read by the light of the subject matter and of the surrounding circumstances." ⁸ It is true that certain types of circumstances have acquired traditional weight. The writers have dedi-

³ Dicey 719.
⁴ RG. (Dec. 13, 1929) 126 RGZ. 196, 206.
⁵ BG. (Sept. 18, 1934) 60 BGE. II 294, 300; see also (Dec. 13, 1932) 58 BGE. II at 435 citing previous cases; (June 19, 1935) 61 BGE. II at 182.
⁶ BG. (March 2, 1937) 63 BGE. II 42, 43; (May 26, 1936) 62 BGE. II 140, 142 and cited precedents.
⁸ Bowen, J., in Jacobs, Marcus & Co. v. The Crédit Lyonnais (1884) 12 Q. B. D. 589, 600.
cated great care to gathering and analyzing these "indicia" of the supposed will, and to classifying their significance. Most elaborate is the list recently given by Batiffol with regard to the United States, England, France, and Germany. The criteria include domicile and, in Europe, the nationality of any party; the situation of an immovable or enterprise; the currency of a money debt; use of a standard form or a public office; the language; reference to a law or terms of a legal system; the domicile of the party who had the contract or form drafted; the situation of collateral guarantees; submission to arbitration or jurisdiction (where this is not considered equivalent to an express agreement); the conduct of the parties after contracting and in pleading. None of these single instances is conclusive by itself, and there is in reality no effective difference of rank among them; any one may prove decisive.

Instead of going into the debatable details of the list, we may illustrate the method by the arguments of outstanding courts in a few cases representing what has been called accumulation of contact points.

The Supreme Court of the United States in a case deemed to be fundamental, considered the facts of a carrier's contract as follows: "The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped 'in and upon the steamship called Montana, now lying in the port of New York and bound for the port of Liverpool,' and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: 'Guion Line."

9 Batiffol 69-154.
10 Dicey (ed. 5) 648 n. (f).
11 Harper and Taintor, Cases (ed. 1) 173.
United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St.’ No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, ‘to tranship the goods by any other steamer,’ would permit transhipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but ‘according to York-Antwerp rules,’ which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (3d ed.) Appendix Q.

“The contract being made at New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage.”

High Court, Chancery Division, South African Breweries, Ltd. v. King [1899] 2 Ch. 173, 177, per Kekewich, J. The contract of employment was executed and intended, though not exclusively, to be performed in the South African Republic. “That, however, is not all. Many other considerations require attention.” The defendant, an Englishman, had been and was residing in Johannesburg, and intended it to be his place of business, and therefore of residence. The successive

employers of the defendant were English companies, resident in England. Nevertheless, "it is not according to sound ideas of business, convenience, or sense to say that a company having a registered office with directors and secretary in England, not, however, otherwise carrying on business here, but carrying on business in South Africa, must be treated as resident in England for the purpose of ascertaining whether a contract entered into by them respecting their business in South Africa was intended to be governed by English law or the local law of that part of South Africa. . . . The stipulation in question (restricting the defendant's business engagements on the termination of the contract) has reference to South Africa and not to England, where the defendant is free to carry on business as he pleases. . . . This contract was not intended to be governed and is not governed by English law." Affirmed [1900] 1 Ch. 273, 275, per Lindley, M.R.: It is doubtful whether the defendant had to act as brewer and conduct his business in Natal or elsewhere in South Africa besides Johannesburg. "However, be that as it may, Johannesburg is the primary place to which this contract refers. . . . That being so, and having regard to the fact that the defendant was settled there at the time and that this contract was entered into between him at Johannesburg and the company's representative at Johannesburg, I think that clause 8 (the stipulation in question) cannot possibly be independent of the Transvaal Law."

German Supreme Court (October 29, 1927) 118 RGZ. 282, IPRspr. 1928 No. 60. The author of a play, the composer of the music and the writer of the stage direction, all conveyed their copyrights to an editor in Stuttgart, Germany. All three at the time of the contract clearly were domiciled in Vienna, where they had also to perform their own contractual obligations according to the purpose and nature of the latter, and all arising legal disputes had to be decided by the Viennese court. But the documents of the contract showed only Stuttgart as the place of making, which was also the domicile of the publisher, and the only place of his performance. The royalties due to the authors are all expressed in German currency. It is of particular weight
that in the present lawsuit both parties from the outset, without expressing any doubt, invoked German law and presently discussed the provisions of the German law on literary property. Pondering these grounds of doubt results in the assumption that the application of German law agrees with the presumable intention of the parties to the contract; it would be, in addition, the appropriate choice of law, if the arguments pro and contra completely balanced each other.\textsuperscript{13}

Swiss Federal Tribunal (September 23, 1941) 67 BGE. II 215. By an agreement with a New York bank, heading a New York syndicate, the defendant Hungarian bank guaranteed that a certain credit granted by the syndicate to a firm in Budapest would be repaid. The Federal Tribunal declared the law of New York to be exclusively applicable, on the following argument. As the Hungarian bank received a commission, no emphasis is to be placed on the domicile of the promisor as would be done in case of a surety. By assuming a share in the risk of the transaction, the defendant entered into close association with the New York syndicate. The presumption is strong that the parties, and particularly the bank leading the syndicate, intended to subject all internal relations to one uniform law rather than to the different laws of the various domicils of the participant firms. Such a consideration must have seemed only natural to the defendant, an expert participant in international credit business. Furthermore, the contract of guaranty is written in English. The place of performance for the defendant's obligation is New York, since the debtor had to pay in New York, and so had the guarantor. Finally the money sums, throughout the transaction, are expressed in United States dollars.\textsuperscript{14}

Courts in most other countries use the same method.\textsuperscript{15}

\textsuperscript{13} See also e.g., 68 RGZ. 205; 73 \textit{id.} 388; 120 \textit{id.} 72; 126 \textit{id.} 206. The individual decision in 118 RGZ. 282 has been criticized by 2 \textit{Frankenstein} 176 n. 179, and \textit{Batiffol} 183 n. 2.

\textsuperscript{14} See also 61 BGE. II 182.

\textsuperscript{15} See for Belgium: App. Liège (June 21, 1905) S.1907.4.21, 23.


2. “Objective” Theory

In most contracts, there is no agreement of the parties on choice of law. Insofar, in fact, “intention is a misnomer.”16 As the Supreme Court of Minnesota, which has repeatedly professed its inclination to follow the law intended by the parties,17 has stated:

“In a search for the actual intent of the parties when none is expressed, there is an element of legal jugglery. Usually parties to transactions . . . , referable to one state or another, or in part to one state and in part to another, have no unexpressed but actual intent as to the law which shall control. The question of what law governs does not suggest itself to them.”18

What courts in reality look for, is a suitable local connection of the contract with a country. Presumed intention is no actual intention. Westlake has contributed much to this view by advocating that a contract should be governed by the law with which it has the most real connection.19 However, the contrast between this objective and the subjective method should not be exaggerated. Also, the inquiry required by both opinions follows strikingly similar methods, though the objective approach does not purport to read the minds of the parties on “contingencies which escaped their notice,”20 but seeks the law suitable to their stipulations. The above examples of reasoning may be read without any substantial change also in this sense.

The German Reichsgericht has sometimes consciously lent the “objective” approach its proper color by using the term familiar to German jurisprudence, “suppletive construction” of the contract, which is approximately the same as the

16 Stumberg 236 n. 49.
18 Green v. Northwestern Trust Co. (1914) 128 Minn. 30, 36, 150 N. W. 229, 231.
19 Westlake § 212.
20 Dicey 719.
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method of implying stipulations. While pure "interpretation" attempts to discover the true meaning of an existing declaration, constructive analysis may add by implication to an incomplete declaration what the parties would or should have agreed, being honest and prudent people, or what an ordinarily prudent man would have declared upon reasonable and fair consideration of all circumstances.

The objective approach has been enacted into law by Poland and Czechoslovakia; these statutes have improved it by establishing certain types of contracts and determining the law of the characteristic obligation in each class.

3. Rationale

Although at present the literature seems to prefer the "objective" approach, a distinguished author defends the subjective formulation because of its suggestive power; it reminds the judge that he should distinctly envisage the two concrete persons at the time of contracting. No doubt also American courts by visualizing the parties and their situation, are aided in the effort to overcome stereotyped rules such as that of the lex loci contractus. Other writers, however, have pointed to the danger of judges disregarding, in a strained search for individual mentalities, the type of the contract so important in the eyes of businessmen.

We may set aside such imponderables and also disregard positive legal complications, such as those occurring when in Germany the Supreme Court reviews a statement by the lower court of an objective rule but not of a presumed intention because the latter is a mere fact.

21 RG. (July 5, 1910) 74 RGZ. 171, 174. Suppletive construction of a contract should serve to fill a gap in the contract, not to enlarge the scope of the contract, 87 RGZ. 211; 136 id. 176, 185; 160 id. 187.
Poland: Law of 1926 on private international law, arts. 8-9.
22 M. WOLFF, IPR. 142. See also HAUDEK 106.
23 RAAPE, IPR. 441.
24 RG. (Jan. 27, 1928) 120 RGZ. 71, 73; MELCHIOR 513.
What it means that the parties “contemplated” a certain law in making the contract, should not be difficult to understand, as parallels are numerous. Anglo-American common law makes the seller of goods liable for “special” damage caused by his failure to perform, to the extent that the parties “contemplated” or could foresee the circumstances causing the damage. The seller has to compensate the buyer’s loss of gain by resale, if resale was contemplated in contracting, that is, if both parties would have affirmed this liability, had they been asked during negotiations. The pertinent question in such a case is whether, at the time of the making of the contract, it must have been in the contemplation of the parties that the goods contracted for might be resold by the buyer. To this method of inquiry, it has been objected that parties making a contract think of performance rather than of breach of contract. To this the celebrated author of the British Sales of Goods Act replied:

“But the answer is this. The liability to pay damages for breach of contract is an obligation annexed by law independently of the volition of the parties, and the criterion is necessarily an objective one. What the parties themselves may have contemplated is immaterial. The question is what a reasonable man with their common knowledge would contemplate as a probable consequence of the breach if he applied his mind to it. The same result will be arrived at if the supposed contemplation of the parties be wholly eliminated.”

This is practically identical with the provision in the Restatement of the Law of Contracts:

“In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract is made. . . .”

26 Hall, Ltd. v. Pim Jr. and Co., Ltd. (1927) 33 Com. Cas. 324—H. L.
27 § 330. See Mr. Justice Holmes in Globe Refining Co. v. Landa Cotton Oil Co. (1902) 190 U. S. 540, 543.
Indeed, the Restaters, very accurately, have pointed out that the requirement of foreseeability does not really depend on a previous consideration of a possible violation of contract, or on a tacit promise of compensation for it, but on the construction of the contract. In this purified form, the common law principle is able to become the basis of a satisfactory general theory deriving the obligations of the parties from the purpose of the contract.

In the same manner, the judicial standard for selecting the law is that of a man of average intelligence and knowledge such as is required in the profession or commerce of either party, who weighs the relative importance of all surrounding circumstances and the stipulations adopted.

The usual formula may mislead a judge into substituting the purpose of one party for the purpose of the contract. Or the inquiry into the probable intention of the parties may fail because each party is supposed to have differently conceived of the legal background. Frequently, in our day, one party prevails and drafts the contract or dictates the use of a blank. The Continental doctrine realistically concludes that the law at the domicil of this dominant contractant may be deemed to be chosen. Courts in this country are instinctively reluctant to increase his predominance by favoring his law. The latter view rests on considerations of public policy alien to our present problem; but, similarly, if a court applies the law of a carrier, bank, or mail-order house rather than that of the customer, this choice of law does not depend on any contemplation of the individual parties, but on the social and economic circumstances.

Another dubious feature in the traditional approach is the emphasis laid on too many "criteria" or "indicia." The judge is induced to consider a mass of irrelevant details—what bearing, after all, has the use of English language in

29 RABEL, 1 Das Recht des Warenkaufs 484, 495ff.
a contract written in New York? He is beset by unnecessary doubts and tempted to weigh mechanically the various elements, rather than to ascertain the most characteristic local contact.

**Conclusion.** In conclusion, the task of the court is this: it has, in the absence of an agreement, first, to state whether the individual facts of the contract are colored by a certain law; if not, second, whether the contract belongs to a class typically centering in a certain country. This inquiry has to be done in full consideration of the circumstances personal and economical, but without inferring judicial or state policies.

**II. GENERAL RULES**

1. **Prima Facie Rules**

The English proper law theory has developed certain presumptions or prima facie rules, ordinarily in former times in favor of the *lex loci contractus*, and in specific types of cases in favor of the *lex loci solutionis*, or the law of the flag, or the "most effective" law.\(^{30}\) Similar methods prevail on the Continent in case investigation into the circumstances fails to reveal a presumable intention. In France and many other countries, the presumption for the law of the place where the contract is made, continues stronger than in England. In Germany and numerous other jurisdictions, following Savigny, the parties are presumed to have in view the law of the place of performance. In some countries, the fact that the parties have a common nationality or domicil constitutes a presumption prevailing over all others.\(^{31}\)

\(^{30}\) Cheshire (ed. 2) 259-269 (in his latest edition, the author opposes any presumptions, p. 211); Dicey 738, rule 148 sub-rule 3.

\(^{31}\) Czechoslovakia: Law on private international law of 1948, § 46 No. 5 (common domicil, if none of the four enumerated types of cases is present).

Italy: Disp. Prel. (1942) art. 25 par. 1 (common nationality).

Poland: Int. Priv. Law, art. 9 (common domicil, if none of the seven enumerated types of contracts is present).
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The "presumption" in all these cases is meant as a guide for the judge, as a starting point and a subsidiary help. The court may or may not resort to it. The Wisconsin Supreme Court has once, facing an inflexible conception of *lex loci solutionis*, declared that the presumption is rebuttable through clear, though not necessarily direct, evidence to the contrary. But the danger is great that the easy way of the presumption may be followed in neglect of the purpose of the individual contract. As a matter of fact, in many jurisdictions the presumption has slowly turned into a rigid, though merely subsidiary, rule.

It is wise, therefore, always to remember how artificial all these presumptions are. As Lord Wright has recalled for English law:

"English law in deciding these matters has refused to treat as conclusive rigid or arbitrary criteria such as *lex loci contractus* or *lex loci solutionis* and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding facts." 83

2. Rigid General Rules

Rigid general rules have developed, as by transformation from original presumptions, also in the absence of an ascertainable intention, or when party autonomy was entirely repudiated. The most pronounced instance of all-inclusive general rules without any regard to party intentions appears in the Restatement. The same system may also be regarded as

Código Bustamante, art. 186.
Costa Rica: C. C. art. 7 par. 1 (common nationality).
Siam: Law of 1939 on private international law, § 13 par. 1.
83 D. Canale & Co. v. Pauly & Pauly Cheese Co. (1914) 155 Wis. 541, 544, 145 N. W. 372, 373.
84 §§ 332, 333.
dominant in the Scandinavian countries and most Latin-American jurisdictions.

Such rigidity deprives the courts of the flexibility enjoyed by American courts under the proper law theory, when they want to escape an inherited lex loci contractus, and by German courts, when feeling the need of a corrective to the lex loci solutionis.

3. “No Rule”

In opposition to the mechanical working of conflicts rules purporting to include all obligatory contracts, a few writers have proclaimed that no fixed principle should govern contracts in general. It has been replied that this proposal itself contains a general principle, viz., that of an individualized choice of law. This principle comes near in effect to the English doctrine of proper law, which avoids tying a court “down to any rigid presumption.”

4. The Most Characteristic Connection

Looking back on the tortuous development of doctrine, we see distinctly that Savigny’s main principle, in the form given to it by Westlake and modernized again in our times, has gained supremacy. The Swiss Federal Tribunal, improving its older formulas, has formally declared that the effects of

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36 Norway: 6 Répert. 578 No. 147
37 See supra pp. 372ff.
38 See Draft, Roquin, Actes de la 3ème Conférence de la Haye (1900) 62 art. 5 par. 3; Jitta, 2 La substance des obligations (1907) 509, 515.
39 Nolde, 32 Annuaire (1925) 119.
40 See among others, 2 Bar 23; Rolin, 32 Annuaire (1925) 96, 117, 513; Lewald 197 No. 257; Nussbaum, IPR. (ed. 1) 221, 226; Batiffol 73 § 80; Raahe, D. IPR. (ed. 1) 263.
41 Words of Dicey (ed. 5) 962.
contracts should be governed by the law having the closest local relation with the contract. In the frequent case of several substantial or even vital local connections of a contract, the degree of proximity may be hard to analyze. But it should always be possible to discover the *most characteristic* connection of an individual contract and, certainly, that of the usual types of business contracts.\(^{41a}\)

This, in the opinion of the writer, is the direction in which all efforts ought to be concentrated.

We are now prepared to survey the main contacts selected either on the strength of a presumption or in virtue of a specific rule. That their importance as general devices is entirely questionable, is a foregone conclusion from the preceding discussion. The particulars, however, are significant.

**B. Contacts**

**I. Historical Note**

The statutists, in the manner of their time, exploited a few fragments of Justinianus' Digest. The "*lex contraxisse*" was the text most frequently cited:

D. 44, 21, Julianus lib. III. ad Minicium. *Contraxisse unus quisque in eo loco intellegitur, in quo ut solveret se obligavit*. This is commonly understood as meaning: every one is deemed to have contracted at the place where he should perform according to his promise (and not: where he promised the performance).

The jurist did not speak of the applicable law but probably, as other passages do, of jurisdiction in the case of bankruptcy proceedings which were alternatively at the domicil of the debtor or at the place where he had failed to satisfy

\(^{41}\) BGE.: 60 II 300; 63 II 385; 67 II 179, 181 ("constant practice").

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the creditor. Whether generally a creditor was entitled to sue in contract at the forum solutionis, as is commonly believed, seems not certain.

Another basic text of the statutists, the "lex si fundus;" refers exclusively to the interpretation of a sale of land, and states that the obligation of warranty is that customary in the region.

It is interesting to note that the Romans in reality did not consider the problem and that the confusion clouding the matter was started by the earlier statutists. Bartolus himself knew of the two kinds of "locus contractus," ever since in the mind of writers, and understood both fragments mentioned as referring to the place where the promisor has obligated himself, that is, where the contract is made, locus ubi est celebratus contractus, while locus in quem collata est solutio, the place of performance, figures in a rule which he deduced from other passages. To harmonize these conflicting rules, he distinguished the rights deriving from the contract at its origin (quae oriuntur secundum ipsius contractus naturam tempore contractus), from the effects of subsequent events, such as the consequences of nonperformance or default (quae oriuntur ex post facto propter negligentiam et moram).

The first were to be governed by the law of the place where the contract was celebrated; the second by the law of the specific place of performance, because the default occurred

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42 See LENEL, Palingenesia Juris Romani, sub: Julianus 862; Dig. 42, 5, 1 and 3 (Gaius 23 ad ed. prov.); Gaius Inst. 3, 79. Other texts are mentioned by SAVIGNY 211 § 370 n. (c); LENEL, 27 Zeitschrift der Savigny Stiftung, Romanistische Abteilung (1906) 74.


44 Dig. 21, 2, 6 (Gaius 10 ad ed. prov.); cf. Dig. 50, 17, 34 (Ulpianus 45 ad Sabinum).

45 BARTOLUS, i. 1 C. de S. Trinitate 1.1, §§ 13-18; cf. WAECHTER, 25 Arch. Civ. Prax. (1842) 42; 1 LAINÉ 135.
there; or if this place were not specified, by the law of the forum. In the fifteenth century, Paulus de Castro added a basic argument for the law of the place of contracting:

*Quia talis contractus dicitur ibi nasci ubi nascitur, et, sicut persona ratione originis ligatur a statutis loci originis, ita et actus.*

The law under which a contract is created, is its natural statute, quite as a person is bound by the law of the place of his origin!

These conceptions were maintained, developed, and modified by subsequent generations of jurists and reappear astonishingly well preserved in the doctrines of Beale.

II. LAW OF THE PLACE OF CONTRACTING

1. To Govern the Entire Contract

*By logical necessity.* Canonists as early as about 1200 A.D., and statutists from the fifteenth century, have regarded the law of the place where a contract is "celebrated" as naturally governing. The variants of this school became numerous, and Anglo-American conflicts law has experienced the tenacity of that radical branch of opinion conceiving a contract "born" in and created by the sovereign of the territory where the parties agree. It is well known that in the Virginia Convention, when a member asked which state determines a contract, Marshall replied that this was decided according to the laws of the state where the contract was made, and those laws only. In a celebrated English case of 1865, the rule of *lex loci contractus* was still based on the

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44 Paul. de Castro ad 1. Si fundus, Dig. 21, 2, 6.
46 ELLIOT, 3 Debates on the Federal Constitution (ed. 2 Philadelphia 1866) 556.
thesis that domiciled persons are subjects of the territorial compulsory power of the sovereign and temporary residents also owe him allegiance. For a long time writers of international law have invoked Ulric Huber's deduction from the principle of territorialism, that the *lex loci contractus* is endowed with extraterritorial authority. The axioms of Dicey and Beale stemmed from the same roots.

By presumed intention. Although, in the doctrine of Dumoulin, Boullenois, and Bouhier, the law of the place of contracting lost its leading role which was taken by the intention of the parties, the same result still obtained in the absence of contrary evidence by general presumption.

At present, the *lex loci contractus*, as a general rule by virtue of a rebuttable presumption *de facto*, continues to apply in France, Belgium, Argentina, Spain, and other countries, while the Dutch courts are as much divided as the American. It is also sometimes claimed that it remains the primary contact in England, where no other law is in-

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51 See Dicey 738, rule 148 sub-rule 3; 2 Beale 1099ff.; Batiffol 22, 35.

52 Cass. (civ.) (Dec. 5, 1910) S.1911.1.129.


54 Argentina: C. C. art. 1205 (1239) regarded as representing the principle, see 3 Vico 122 § 137; Romero del Prado, 2 Manual 343 notes that the codifier has followed Story §§ 242, 280; Goldschmidt, 2 Sistema 489.

55 Spain: Trías de Bes, 6 Répert. 257 No. 124 par. 2. See, however, Goldschmidt, 2 Sistema 82 ff., 457.

56 Denmark: As a limited rule, see Borum and Meyer, 6 Répert. 224.

Italy: For civil contracts on the basis of Disp. Prel. 1865, art. 9 § 2: App. Trieste (Jan. 7, 1937) Riv. Dir. Com. 1937 11 547; Disp. Prel. 1942, art. 25, which are probably to be understood to apply a factual presumption.

Código Bustamante, art. 186, at least nominally speaks of *lex loci contractus*, if the parties are of different nationalities, as a presumption; it seems, however, that no counterproof is allowed, see art. 184 par. 2, which substitutes the criteria of art. 186 for the tacit intention of the parties.

57 The Netherlands: See for the cases, van Hasselt 176 and Supplement 45. The attempt by Kosters 774 to base the *lex loci contractus* rule on art. 1382 of the Civil Code prescribing construction of contracts according to the local customs, has been abandoned by the author himself in Themis 1926, 480; cf. E. M. Meijers, Note in N. J. (1927) 323.
tended or presumed, and this seems true in the Dominions. But it may be doubted whether the law of the place of performance has not in fact won precedence in the favor of the English courts.

By fixed conflicts rule. On this historical background in many countries the lex loci contractus has become the law generally applicable to contracts, either as a subsidiary rule in the absence of contrary intention of the parties or even with higher pretensions. The list of codes thus providing is long.

58 England: CHESHIRE (ed. 2) 261 principally alleges Peninsular and Oriental Steam Navigation Co. v. Shand (1865) 3 Moo. P. C. Cas. (N. S.) per Turner, L. J., 272, 290 and another case, both of which, however, deal with transportation; in the latest edition (ed. 4, 208), the author opposes any presumption.

Canada: The principle is confirmed in Bondholders Securities Corp. v. Manville (Sask.) [1933] 4 D. L. R. 699; Comm. Corp. Securities, Ltd. v. Nichols (Sask.) [1933] 3 D. L. R. 56 (bills and notes); see also 3 JOHNSON 457 n. 1 and the Digests.


59 See RABEL and RAISER, 3 Z. ausl. PR. (1929) 66; BATIFFOL 90 § 99.


Austria: C. C. §§ 36, 37 with exceptions.

Belgian Congo: C. C. art. 11 par. 2.

Brazil: C. Com. art. 424, replaced by Law No. 2044, of Dec. 31, 1908, art. 47; for bills of exchange, generalized by the doctrine, see BEVILAQUA (ed. 3) 365;

C. C. Introd. (1916) art. 13 par. 1; Introd. Law (1942) art. 9.

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

China: Int. Priv. Law, art. 23 par. 1.

Costa Rica: C. C. art. 7 par. 1.

Czechoslovakia: Int. Priv. Law, § 46 No. 5.


French Morocco: Int. Priv. Law, art. 13 par. 2.


Iran: C. C. art. 968.

Italy: Disp. Prel. (1865) art. 9 par. 2; (1942) art. 25; former C. Com. art. 58.

Japan: Int. Priv. Law, art. 7 par. 2.

Panama: C. Com. art. 6 (1) not altered by Código Bustamante in relation to the United States, see EDER, 15 Tul. L. Rev. (1941) 521 at 524 n. 283.

Peru: C. C. (1936) art. VII.

Poland: Int. Priv. Law, art. 9 Nos. 1, 2.

Portugal: C. Com. art. 4 § 1.

Quebec: C. C. art. 8.


Syria: C. C. (1949) art. 20 par. 1.

Uruguay: C. C. art. 2399.
That this favor has been so tenaciously granted to a device of very difficult application, must have been aided by the universal acceptance of the same law to control the formalities of contracts. In Lorenzen's opinion, the American law has never adopted that distinction between form and substance in contracts, by which in the Continental doctrine the old adage, *locus regit actum*, was confined to formalities. A modern writer has directly accused the rule prescribing the law of the place of contracting for all contracts as arising out of a confusion between form and content.

The Soviet codes of civil procedure prescribe with very cautious words that the court should "consider" the law of the place in a foreign country where contracts and documents have been made. The more recent Ukranian version is more categoric on this point. But writers have seen in this hint not a conflicts rule but an advice that Soviet law is controlling in every single case.

2. To Govern the Making of Contracts

The old doctrine expressed by Bartolus has produced various theories, splitting the problems of contracts into origin and subsequent events. Story and Savigny, however, repudiated these efforts by adopting an all-inclusive law of the contract and in this respect were followed by the great

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61 Lorenzen, 30 Yale L. J. (1921) 655 at 664.
62 Roguin, Actes de la 3ème Conference de la Haye (1900) 62.
63 Kelmann, Int. Jahrb. Schiedsger. Wesen (1928) 84 n. 34; Makarov, Precis 299 (slightly more optimistic in assuming resemblance to a conflicts rule). RSFSR, Code of Civil Procedure (1923) art. 7; Ukraine, Code of Civil Procedure (1929) art. 9. See also the provisions in treaties on the status of Soviet trade delegations abroad, supra p. 375 n. 61. For genuine conflicts rule authors cited supra n. 60.
64 Burgundus, Tractatus 4 Nos. 7, 10, 29; Boullenois, Traite de la personnalite et de la realite des loix (1766) Vol. II, 451; Casarecis, Discursos legales de comercio, Disc. 179 §§ 56ff. P. Voet, De statutis eorumque concursu, sect. 9 cap. II No. 12 (Savigny, tr. Guthrie, 490); Prussian Allgemeines Landrecht I, 5 § 256ff.

65 Story § 280, as he thought, in conformity with the Roman law.
66 Savigny § 372, tr. Guthrie 225, although his method of treating the Roman sources is not approved at present.
majority of scholars. Nevertheless, some writers in the nineteen­teenth century returned to the method of dividing contracts into two parts. The formulas were varying, but none was in precise terms. The leading idea seemed to be that the local law of the place of contracting should govern the legal effects naturally arising from, and inherent in, the contract, or believed to be positively intended by the parties. This reasoning still clung to the belief that these “effects” necessarily grow out of the local law. These are contrasted with “suites” of the contract, i. e., the influence of more remote or unforeseen events, such as acts of God, new legislation, insolvency, illness, impossibility, or any cause of nonperformance, including the problems of fault, default, and damages as well as the ratification of a void contract. These ulterior influences on the contract are deemed subject to the law of the places either where performance was due, or where the events occur. Again, this theory has been decisively criticized. “Consequences, effects, suites: these three words appear synonymous to us.” But strong remnants of the old bisection are to be found in court decisions and in the teachings of Minor and Beale. The Restatement, unfortunately, has solemnly proclaimed this very approach (§ 332).

While American courts, however, pay no more than lip service to this theory, in Switzerland the original idea has been fully received by the Federal Tribunal. Until recently this court subjected, by imperative rule, all problems connected with the creation of contracts to the law of the place

67 I Foelix § 109; Valéry 987 § 685; I Fiore §§ 119, 121 and in 20 Annuaire (1904) 176; in Spain: Manresa, 1 Comentarios Cod. Civ. Esp., art. 11 § IX; Valverde, 1 Trat. Der. Civ. (ed. 3) 129; Foelix’s doctrine has impressed Phillimore, 4 International Law §§ 709ff.

68 Asser-Cohn 46; Asser-Rivier 81 § 37 (sometimes erroneously cited as follower of Foelix); Survile 355, 357; Harburger, 19 Annuaire (1902) 137; Roguin, id. (1904) 77; Rolin, id. (1906) 199; Despagnet 897 § 303; Nolde, Revue 1926, 448.

69 Minor 401; 2 Beale 1199 § 346.1. Contra: see Batiffor 69 § 77.
where they were made. The "effects" of the contract are left to the intention of the parties and subsidiarily to the law of the place of performance.

Illustration. Where a dye firm in Milan sent an agent to Zürich to buy dyes, the Federal Tribunal determined under Swiss law the question whether the firm or the agent was the party to the contract, and under Italian law whether the buyer was entitled to reject the merchandise.

The Swiss literature, once divided on this question, has influenced the recent reversal of the Federal Tribunal restoring accord with the general opinion. It is true that the Supreme Court of the United States once also, in 1875, pronounced the rule that the formation and validity of contracts follow the lex loci contractus while matters regarding performance are subject to the lex loci solutionis. This leading case has had some following but has been regularly disregarded by the Supreme Court itself. The German Reichsgericht has occasionally used arguments of this kind in case of a mistake made in applications for insurance.

Impracticability of the division. While the various approaches resulting in bisecting the development of the contract produce somewhat different disadvantages, their com-

70 Supra pp. 398-399. For the purpose of the special case concerning the extent of authority of an agent making the contract, the Federal Tribunal expressed the rule in the form that the conflicts rule of the place of contracting determines whether the contract is perfected. BG. (Dec. 14, 1920) 46 BGE. II 490, 494.
71 BG. (March 5, 1923) 40 BGE. II 70. See also the proposals by Lapajne, 4 Bl. IPR. (1929) 65.
73 Scudder v. Union National Bank (1875) 91 U. S. 406.
mon idea is inadequate. A conflicts rule concerned with validity or formation must include the extent of the obligation created, as Beale has conceded. But there is no consistent dividing line possible between the extent of a contractual obligation and its performance. Both together form the purpose of the contract and are its very core. Whether an event making performance impossible or onerous frees the debtor from his entire duty, or only from paying damages, or not at all, is determined by the distribution of effort and risk implied in the contract. 75

This is true of the civil law systems, in which specific performance is the object not only of the obligation but also of the judgment in case of breach. It is equally true in common law, although merely the duty to pay damages for non-performance is enforced. For it is always the contractual promise that creates the primary object of the obligation.76

3. American Law

Surveys covering cases in the United States are unanimous in stating that validity of contracts is tested in the courts by varying criteria. 77 In Beale's own statistics of 1910, only a minority of six states professed to follow the place of contracting rule. 78 In 1934, he claimed that under the influence of the Restatement drafts the number of these states had increased to eleven certain and eleven other dubious states, 79 but these statements have been criticized in several respects.80

On the basis of recent observations, we ought to be aware of

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78 BEALE, 23 Harv. L. Rev. (1910) 194 at 207.
79 2 BEALE 1172 and 1173 with respect to a doubtful presumption for this law in New York.
80 See in particular BATIFFOL 87 § 96; NUSSBAUM, 51 Yale L. J. (1942) 892, 90ff.
the fact that the cases in which courts have resorted to this rule, pertain to at least four groups.

(i) In the majority of the cases, no problem is presented, particularly when the place of contracting and that of performance, or the former and the domicil of the parties are situated in the same jurisdiction, and no other connection competes in significance.\textsuperscript{81}

(ii) In other cases the contract is made in a jurisdiction where also some other element considered determinative occurs, although performance and domicil of one, or even of both parties may be elsewhere. For instance, contracts of carriers are ordinarily subjected to the law of the place where the contract is made and the transport begins.\textsuperscript{82}

(iii) Not infrequently, lip service is paid to the place of making rule, while in fact a quite different law is applied.\textsuperscript{83}

(iv) The rule is mechanically applied without appreciable discernment in a considerable number of cases. Moreover, it is not the habit of the courts when they apply the law of the place of contracting to a problem of validity, to decide whether the same law would apply also to other contractual problems. And conflicts respecting validity are in an overwhelming majority in this country, a phenomenon obviously caused by the differences of statutes in such matters as statute of frauds, usury, exemption from liability, or Sunday laws, in contrast to the uniformity of the common law rules on performance.

All this warns strongly against Beale's statistical estimates. Not only is the exclusive force of his validity rule inconsistent with the existing law but its significance for the development of the practice is greatly overestimated. Scholars of such intimate knowledge of the decisions as Lorenzen and Batiffol conclude that, whenever the choice between con-

\textsuperscript{81} Mueller, 8 Z. ausl. PR. (1934) 888.

\textsuperscript{82} Batiffol 239 § 267.

\textsuperscript{83} Cf., e.g., infra pp. 460f., 464.
tracting and performance has become material, the latter has been emphasized by the courts.  

4. Determination of the Place of Contracting

Where is the place of contracting? Which law has to govern this question? We do not share the opinion of an old Canadian case that "the question as to what country is the *locus contractus* in each particular case is not a question of foreign law, it is a question of fact." Without exhausting the much debated matter, we ought to mention a few delicate points.

*Contracts between absent persons.* The present municipal laws are notoriously in disagreement on the question at which moment a contract in the making by correspondence emerges from preliminary negotiations. At common law, a contract is considered executed as soon as the addressee of an offer dispatches his acceptance (theory of expedition, mailbox-theory, *Übermittlungs-Theorie*). Civil law countries are divided in their adherence to the following views: that acceptance must only be declared (theory of declaration, *Aeusserungs-Theorie*); or must arrive at the offeror’s address (theory of arrival, *Zugangs-Theorie*); or must be received by him (theory of reception, *Empfangs-Theorie*); or must come to his knowledge (theory of information, *Vernehmungs-Theorie*). It is by no means settled that all these views of the time when negotiations arrive at the stage of binding force, justify conclusions on the question at what place a contract is made. But generally this seems to be taken for granted. If so, it is important which law is decisive to

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84 Lorenzen, 30 Yale L. J. (1921) 565 at 578; Batiffol § 96. We shall have to make our own remarks at a later juncture.


86 For comparative law, see Rabel, 1 Recht des Warenkaufs 69-108; Institut International de Rome pour l'Unification du Droit Privé, De la formation des contrats entre absents. Étude Préliminaire (mimeographed) S. d. N.—U. D. P. 1935, Étude XVI.
answer the question where “the place of contracting” is. (There arises, of course, the other problem whether a contract is created at all, but this will be discussed later.)

Illustration. In 1913, when Trieste was Austrian, an insurance company domiciled in that city concluded contracts by a general representative in Tunis, on the basis of “gold francs.” In 1934, after the various currency depreciations, Italian courts having to decide on the amount of the insurance claim, followed the conflicts rule of the Austrian Civil Code (§§ 36, 37) which refers to the law of the place of contracting. Although the construction of these provisions is doubtful, it was assumed that a contract is concluded under Austrian civil law by information to the offeror and under Austrian commercial law sometimes by information and in other cases by expedition of the acceptance, while it was believed that under French law applicable in Tunisia, declaration of acceptance was decisive (which is doubtful, too). The Italian courts, for the purpose of applying the Austrian place of making rule, attempted to ascertain the location of this place under the lex fori, which meant in this case the Austrian Commercial Code and, consequently, held the contract to have been perfected by delivery of the policy through the agent in Tunis. Therefore, French municipal law was to govern the money problem.

The method, hence, is the same as that used in ascertaining jurisdiction. Supposing a court has jurisdiction to judge a breach of contract only if the breach occurs in its district, an ordinary simple case is decided as follows:

Plaintiff resided in Ontario but carried on business in Montreal. He sold this business to the defendant; the agreement was executed by plaintiff in Toronto, sent to defendant in Montreal, and signed by him there. The Ontario court held that the execution in Montreal completed

the contract, hence the Quebec law applied to the effect that the place of payment was at the domicil of the debtor. Therefore, the breach of contract took place in Quebec, and the Ontario court had no jurisdiction. 88

This astonishing game of lawyer's niceties may, in this case, rest on the unexpressed background that an Ontario court does not want unnecessarily to interfere with the sale of a business in Quebec. This, in fact, would furnish a wise rule. But embarrassment is the daily characteristic of the prevailing approach.

Every court using this method applies its own domestic theory. An English court will stress the place where the letter of acceptance is posted. 89 A Canadian will do likewise, provided that this letter reaches the offeror. 90 It is true that a merely casual mailing on a voyage need not necessarily be accepted as decisive. 91 Numerous conflicts laws provide for the same solution. 92 Belgian, Dutch, Italian, and Swiss courts


A contract by telex communications, being an instantaneous communication, is only perfected when the offeror receives the acceptance; this English rule was applied to negotiations between England and the Netherlands, Entores v. Miles Far East Corp. [1955] 2 Q.B. 327 (C.A.).

90 Magann v. Auger (1901) 31 S. C. R. 186 applied to these problems, see cases in 3 Johnson 670 n. 1; Charlebois v. Baril [1927] 3 D. L. R. 762.

91 Cheshire 226; 3 Johnson 473; Mann, 18 Brit. Year Book Int. Law (1937) (supra p. 397 n. 18) at 104. Cook, Legal Bases 425 regards casual places of mailing ruled out by the real meaning of the place of contracting, which he does not explain, however. French courts resort to interpretation of the intention of the parties; see, for instance, Trib. civ. Seine (July 5, 1939) Revue Crit. 1939, 450, Note, id. 456: agreement between three German refugees in a hotel room in New York, German law common to all applied. Compare the refusal to apply the lex loci contractus in the case of a Sunday contract made in a hotel room of New York, Brown v. Gates (1904) 120 Wis. 349, 97 N. W. 221, infra Chapter 33, p. 566 n. 36.

Switzerland: BG. (July 12, 1938) 64 BGE. II 46.

92 China: Int. Priv. Law, art. 23.

Czechoslovakia: Law of 1948 on private international law, § 46 No. 5.

Japan: Int. Priv. Law, art. 9.

Poland: Law of 1926 on private international law, art. 9 par. 1.

Siam: Law of 1939 on private international law, § 13 par. 2.
employ their own theories of reception or information, and the French courts, being divided in the municipal domain, follow each its usual view.

If the internal systems involved agree, some writers presume an implied agreement of the parties in favor of the law thus indicated.

Proposals flowing from awareness of the international purpose of conflicts law have either radically discarded the role of "contracting" in case of correspondence, or have pointed rather to the place from which the first offer is sent, the offer deserving preference over the acceptance as the initial step and the basis of the contract.

**United States.** Characterization according to the lex fori

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94 KOSTERS 763, 766.

95 SURVILLE 340 n. 2, 341; BACCARA, 5 Répert. 223 No. 26 (distinguishing four systems); App. Rennes (Dec. 15, 1891) Clunet 1892, 912 (theory of declaration of the acceptance); App. Colmar (March 11, 1925) Clunet 1926, 411 (arrival of the letter of acceptance; possibly following the German view).

96 KOSTERS 768.

97 See the authors cited supra n. 37.

98 To this effect the old writers cited by WAECHTER, supra n. 64, at 45; in modern times, SURVILLE, in Clunet 1891, 361, cf. 1028; DIENA, 1 Dir. Com. Int. 478; LEREBOURS-PIGEONNIÈRE (ed. 3) 449 § 360, abandoned in the latest edition (ed. 6, p. 407); WALKER in 1 Klang's Kommentar 318 and authors cited; Institute of Int. Law, resolutions of 1908, art. 4, 22 Annuaire (1908) 99, 285, 291.

Poland: Int. Priv. Law, art. 9 No. 1 sent. 3: where the offeror receives the acceptance of the offer.

Siam: Law of 1939 on private international law, § 13 par. 2 (place of receiving acceptance of offer).

**Treaty of Montevideo on Int. Civil Law (1889) art. 37; (1940) art 42: law of the**
has recently been advocated also in this country. However, thanks to the fairly uniform doctrine of contracting in the United States, the problem does not present itself with the same acuteness. The Restatement had no difficulty in providing on principle that the place of contracting is the state from which the acceptance is sent (§ 326, b), parallel, though not in necessary conjunction, with the principle that a contract is made at the time when the last act contributing to the consent is done, as formulated in the Restatement of Contracts, § 64. But it is not clear whether this proposition, which is specifically American, applies to a contract made by correspondence between persons in San Francisco and Mexico City, or New York and Paris. If so, the lex fori doctrine of the other countries is followed with the identical disastrous effect, that different places of contracting will be stated in the courts concerned, and thus different results are produced under the same conflicts rule.

Contracts on board a ship or airplane. On the continent, the law of the flag substitutes the law of the place of contracting; in the United States, the Uniform Aeronautics Act designated the state over the territory of which the contract was concluded as locus contractus.

Contracts in consulates or embassies. Italian courts have held contracts concluded in foreign consulates or embassies, at least for purposes of jurisdiction, as concluded in Italy.
Binding force of offers. An analogous problem arises out of the diverse effects of offers.

Illustration. Renfrew Flour Mills in Ottawa, Ontario, offered to Sanschagrin, limitée in Trois-Rivières, Quebec, 40,000 bags of flour with the proviso that “the contract must be entered into within eight weeks, otherwise this offer is to be withdrawn.” Before the end of the time, however, the offer was retracted. Under Quebec law, the offer, strangely termed a “contrat unilatéral,” was considered binding. Ontario law does not recognize a transaction without consideration. The court applied Ontario law without squarely facing the problem.\(^\text{101}\)

Various cases treated in the Restatement. The Restatement devotes twenty-one sections to the determination of the place of contracting. Some of these provisions are highly questionable. For instance:

“A, in state X, writes to the M company, a mail-order house in state Y, ordering a stove from M’s catalog and offering to pay the catalog price. M in response to the letter procures the shipment of the stove from its factory in state Z. The contract to pay for the stove is made in Z.” (§ 323, illustration 5).

This type of contract, termed in the Restatement an “informal unilateral contract,” at common law has not been absorbed into the ordinary concept of sales contracts. A’s promise of payment is made under the condition that B send the stove.\(^\text{102}\) Therefore, obviously the Restatement draws an analogy between mailing a letter of acceptance and expedition of the stove. But it forgets that business letters concluding a sale are usually posted at some place of management and not sent from a mere manufacturing plant situated in another state. Reasonably, the place of shipment may determine the applicable law, if an individual stove is bought and

\(^{101}\) Renfrew Flour Mills v. Sanschagrin, limitée (1928) 45 Que. K. B. 29.

\(^{102}\) Restatement of the Law of Contracts §§ 12, 55.
the buyer knows of its location in Z, or if the catalog states that delivery shall be made at the factory or warehouse in Z. In the given example the solution is inadequate.\(^{103}\)

If the Restatement localizes rights arising from tort at the place where the last act completing an injury is done, this is a tolerable solution because the *lex delicti comissi* is closely connected with territorialism. But the two questions when and where a contract is concluded, ought not to be indiscriminately identified. The time of completion is of great importance for many problems of substantive law in which the place is of none.\(^{104}\) Again, in private international law, localization should be subordinated to foreseeability by the parties and other considerations of convenience.

Another striking illustration to the same section ventures the following bizarre solution:

A father in state X promises his son \(\$10,000\) if he marries M. The son marries M in state Y. The contract for payment of the money is made in Y.

The mistake of confusing the making of a conditional promise with the fulfillment of the condition underlies also if a guarantee for future credits is localized at the place “where the credit is given in reliance upon the guarantee” (§ 324).\(^{105}\) Whether these rules are sound in themselves, is another matter.

*Discretionary assumptions.* This survey would be incomplete without noticing that the uncertainty included in the principle of *lex loci contractus* is sometimes welcomed by the courts. When a proposal is sent from one state to another, or an agent intervenes in transmitting an order, an application, an insurance policy, a note, prepared here and sent there for approval and signature and then forwarded again to a

\(^{103}\) Cook, Legal Bases 384, observes that the cases are directly contrary to the illustration given in the Restatement.

\(^{104}\) RABEL, 1 Recht des Warenkaufs 93.

\(^{105}\) This section has been already criticized by NUSBAUM, Principles 171.
third state—a court may sometimes manage an equitable decision concerning the capacity of a married woman or the violation of a usury statute, by purposefully locating the place of contracting in the desirable jurisdiction. It is a process similar to the stating of an individual’s domicile so as to reach a final judgment seeming sound, both tricks that may appear satisfactory so long as the conflicts rules are not.

Contracting in another state. Finally, the lex fori theory encounters another obstacle. As will be remembered, it has been urged that a court should not assume domicile (like nationality), to exist in another state, contrary to what is assumed in that state itself. It is not less strange that states X and Y should each locate an individual contract in the territory of the other, and in this way obtain opposite results as to validity or effect. Such a negative conflict of conflicts rules is particularly queer in view of the traditional support of lex loci contractus by the idea that the contract is dominated by the state of its origin. The truth of the matter is that the lex loci contractus is a fallacious device wherever the making of a contract is substantially connected with two states.

5. Rationale

Critical appraisal of the lex loci contractus has been so frequent and thorough that only a short résumé is called for.

Once, the law of the place of contracting was deduced from some idea of sovereign power over the persons doing acts in the territory, and simple facts were faced such as a sale in an open market, or a deed solemnly executed in an official’s room, the latter a case still enjoying a privileged place in some otherwise poor conflicts codifications. Of all the theories of sovereignty, territorialism, and vested rights, none has survived criticism. Lex loci contractus is no logical necessity for any problem. This much has become a commonplace despite Beale and formerly the Swiss courts.
Respecting arguments of convenience, the place of contracting has lost its obviousness in all those modern situations in which either there is no one such place or the place of creating the contract has no significance for the purpose of the contract.

Followers of this inherited approach, it is true, never grow tired of assuring us that it is the most certain place, best known to the parties who therefore can easily ascertain the applicable law. Hence, the rule should at least serve well as a general subsidiary precept. The adversaries, from Savigny to Wharton, Dicey, Lorenzen, and innumerable Continental writers, point to the accidental nature of this place in our epoch of travel, the indifference of most parties to the local law, or for that matter, to any law, and the difficulties inherent in contracts by correspondence. All international draft proposals have rejected the *lex loci contractus*.

The solution ought to depend on the facts. When a contract is concluded in a state where both parties live, or in an international market, or in a cash and carry operation between a resident and a transient, all practicable theories agree on the law of this state as a subsidiary rule. But the real problems begin beyond this circuit. The rule is a device insufficient in itself, because it needs supplementary facts to operate, and is inadequate in many cases. It defies common sense every time when it makes the fate of a contract dependent on the legalistic finesses determining at what place the deal was completed in the juristic sense.

Under this angle, it is regrettable that even some advocates of the law of the place of performance take refuge in the law of the place of contracting *as such*, when the former is

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106 Most recently, Cavers, Book Review, 56 Harv. L. Rev. (1943) at 1173, claims usefulness of the Restatement rule, because it provides ready answers.

107 Lorenzen, 30 Yale L. J. (1921) 565, 655; id., 31 Yale L. J. (1921) 53.

108 See Rougin, Actes de la 3ème Conférence de la Haye (1900) 62; De Visscher, 48 Recueil (1934) II 354-356; Nolde, 32 Annuaire (1925) 62-64; Stumberg 231; Batiffol §§ 83-85.
This seems rather to prove the defective nature of all schematic rules for contracts in general. Courts adhering to this venerable but unreliable tradition, have often turned the tables on it. Sometimes the old *quid pro quo* of the Pandectists has been used, calling the law of the place of performance the *lex loci contractus*, or confusing *lex loci contractus*, that is, the law in force at the place where the contract is made, and *lex contractus*, that is, the law governing the contract as a whole. These artifices have been censured. Again, as early as 1892, *lex loci contractus* has been referred by a sensible American court "to the place of the seat of the contract as distinguished from the place where it may casually happen to have been signed." Finally, the rule very often has been rendered meaningless by asserting the *lex loci contractus* to be the general rule and, in the same breath adding that when performance is due in another state, the law of the latter state governs. This amounts to a pure recognition of the *lex loci solutionis*.

**I I I. LAW OF THE PLACE OF PERFORMANCE**

1. Historical Note

Savigny and his school substituted the law of the place where the contract is to be fulfilled for that where it is concluded. They believed that the Roman jurists agreed with their view, and argued that in contrast with the accidental

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109 *Batifol* 87.
111 See 15 C. J. S. 880. French writers often use *lex loci contractus* in this sense and term the law of the place of contracting *lex loci actus*, a misleading terminology.
112 See Niemeyer, *Das IPR. des BGB.* 113 against Clunet 1891, 1926.
114 Story § 280; cf. Lorenzen, 30 Yale L. J. (1921) 667; *infra* this page.
115 Savigny § 370; 2 Bar 9; Unger, 1 System 179; Dernburg, 1 Pandekten 105; Regelsberger, Pandekten 173; Saxony C. C. (1863) § 11; report by Enneccerus and resolution, 24 Deutscher Juristentag, 4 Verhandlungen 83, 112, 127.
RULES IN ABSENCE OF PARTY AGREEMENT

nature of the locality of contracting, the parties carefully determine the details of performance. It is true, indeed, that business stipulations, in connection with usage, make it ordinarily clear where goods or services are to be delivered and received. This place, the authors emphasize, is of paramount importance for the structure of the contractual relationship, and foremost in the interest and "expectation of the parties."

Story had paved the way to this consideration. Although he upheld the tradition that "the validity of a contract is to be decided by the law of the place where it is made" (§ 242), which proposition he based on the presumed intention of the parties, he added:

"But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation is to be governed by the law of the place of performance." (§ 280).

2. Countries

Under these influences the lex loci solutionis has become the firmly established subsidiary test of all contractual obligations in Germany, and certain American and other jurisdictions. Sometimes it is the test only for the "effects" of

116 RG., 6th Civil Chamber, in 61 RGZ. 343; 62 RGZ. 379 under ZITTELMANN's influence applied the domiciliary law of the debtor; overruled by RG. (Sept. 25, 1919) 96 RGZ. 262, (Sept. 29, 1919) id. 270. The fifth chamber left the question open in RG. (Dec. 18, 1920) 101 RGZ. 141, but agreed with the law of the place of performance (Dec. 7, 1921) in 103 RGZ. 259; (June 2, 1923) 107 RGZ. 44; (Oct. 3, 1923) 108 RGZ. 241. The subsequent decisions are collected by LEWALD No. 281ff.; MELCHIOR, JW. 1925, 1574 n. 38.

117 California: C. C. § 1646.
South Dakota: Code (1939) § 10.0106.
Chile: C. C. art. 15 § 1 (if this place is in Chile).
Greece: Formerly, C. C. (1856) art. 6.
Nicaragua: C. C. art. VI, 14.
contracts, and in some countries, it is imperative when contracts are to be performed within the forum.

In British courts, this law is not an exclusive but a favorite device.

In the countries applying the law of the place of contracting on the basis of a presumption, such as France and Italy, counterevidence is allowed to prove that the intention of the parties veered to the law of the place of performance.

*United States.* In striking contrast to the Restatement, Lorenzen has concluded from the cases that “most of them apply the law of the place of performance when it differs from that of the place of contracting, without reference to the other surrounding circumstances.” In a recent inquiry the French scholar, Batiffol, confirms this view. He thinks the American courts have given Story’s text an adequate and successful interpretation by adopting the *lex loci solutionis,* if at the time of the contract the place of fulfillment was already determined in the mind of the parties. Such statements, of course, provide us merely with a starting point in a complicated inquiry.

3. Mode of Fulfillment

Irrespective of the law applying to the rest of the contract,

Spain: Córdova, “El Derecho Interregional,” 107 Revista Gen. Legisl. y Jur. (1905) at 20; Castan Tobenas, 1 Derecho Civil Español, Común y Foral (ed. 6, 1943) 100.
Montevideo Treaty on Int. Civil Law (1889) arts. 32, 33; (1940) arts. 36, 37.
Czarian-Russian law, see 14 Z.int.R. 31, 35.

Switzerland: (As to the “effects”) BGE.: 32 II 268; 34 II 648; 36 II 6; 37 II 601; “constant practice” recognized in 47 II 541; 49 II 225; 59 II 361; cf. Homberger, Obl. Verträge 41; Niederer, 60 Z. Schweiz. R. (N. F.) (1941) 275a.


Argentina, Chile, Mexico and others, see supra pp. 362-375 and p. 401 n. 33.

Westlake 300 § 211; Dicey 738; Batiffol § 99.

Lorenzen, 30 Yale L. J. (1921) 565, 578.

Batiffol 89.
the law of the place of performance is firmly entrenched as governing the "mode and incidents,"\textsuperscript{123} or "modalities" of payment or other performance, if no contrary intention is proved.\textsuperscript{124} This universal rule includes the application of the \textit{lex situs} to the transfer of real or personal property as object of an obligation, and of the local law to the precise place, time, and manner of tender and delivery. Judge Learned Hand once\textsuperscript{125} took opportunity to enumerate American cases applying this rule with respect to a moratorium,\textsuperscript{126} payment upon a forged endorsement,\textsuperscript{127} delivery of a note as payment,\textsuperscript{128} payment in one currency or another,\textsuperscript{129} the question who is the proper payee\textsuperscript{130} or consignee,\textsuperscript{131} and time of grace on commercial papers.\textsuperscript{132} The international literature and practice agree in subordinating to this law: the tender of goods and services, the duty of the creditor to deliver a receipt, the currency in which a money debtor may be compelled to pay the amount due, for example what "franc" or "pound" means if it is also a money unit at the place of per-


\textsuperscript{124} Boullenois, 2 Traité de la personnalité et de la réalité des loix (1766) 500; I Foelix 233; 2 Bar 21, 88; Weiss, 4 Traite 387; Foote 399, 477; and all other writers with the only exception of Pillet, 2 Traité 181 § 486.

Austrian Allg. BGB. § 905: "With regard to measure, weight and kind of money, the place of delivery is determinative." Former Italian C. Com. art. 58, as commonly construed, see, e.g., Cass. (June 8, 1933) Foro Ital. 1933.1.938.

\textsuperscript{125} Louis-Dreyfus \textit{et al.} v. Paterson Steamships, Ltd. (1930) 43 F. (2d) 824, 827.

The following citations have been adduced by Judge Hand himself.

\textsuperscript{126} Rouquette v. Overmann (1875) 10 L. R. Q. B. 525.


\textsuperscript{129} Anonymous (1784) 1 Brown Ch. C. 376; Benners v. Clemens (1868) 58 Pa. 24.

\textsuperscript{130} Graham v. First Nat'l Bank of Norfolk (1881) 84 N. Y. 393, 38 Am. Rep. 528.

\textsuperscript{131} Yokohama Specie Bank, Ltd. v. U. S. Fidelity \& Guaranty Co. (1923) 123 Wash. 387, 212 Pac. 564; rehearing, 216 Pac. 851.

formance, and like questions of weights, measures, working days, and business hours.

*Illustration.* Two merchant firms in Capetown arranged with a bank of the same city credits for buying flour in the United States. The bank promised to honor the seller’s draft upon them at its New York branch, provided that the bills of exchange were accompanied in one case “by bill of lading and insurance policy,” and in the other “by full set of shipping documents including marine and war risk policies for merchandise shipped to Capetown.” The South African court presumed that the parties intended to have American law govern the question what documents the bank was obliged to tender with the drafts in performance of the contract.

The exact scope of this minimum application of the *lex loci solutionis*, however, will need investigation by detailed discussion. It is a mistake to extend the *lex loci solutionis* when it is not the law governing the entire contract to the currency problems determining the quantity of money to be paid. This is a part of the substance of the contractual obligation, and the same should be recognized as to the persons by whom or to whom performance shall be made, sufficiency of tender, and excuses for nonperformance. The Restatement (§ 358) assigning these problems to the law of the place of performance, although it forcibly subjects the nature and extent of the duty for the performance and the time of performance to the *lex loci contractus*, has established a unique and untenable proposition.

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134 In Germany the law of the place of performance is applied to these questions as incident to its general scope, see 6 RGZ. 132; 96 id. at 272; 106 id. at 61; RG. (April 22, 1922) Warn. Rspr. 1922, No. 57.


136 See for the present, 2 ZITELMANN 396; LEONHARD, Erfüllungsort und Schuldort 92; MELCHIOR § 192; MANN, The Legal Aspects of Money (ed. 2, 1953) 289.
4. Several Places of Performance

Savigny conceived that a contract may embrace several duties each to be fulfilled at a separate place. He meant to apply the law of each place respectively.\textsuperscript{137} Windscheid\textsuperscript{138} and Bar\textsuperscript{139} formed their own variants of this theory which has since been consistently observed by the German Supreme Court.\textsuperscript{140} In particular, where bilateral contracts are not by intention assigned to some unitary law, the obligation of either party is determined by the law of the place where he is obliged to perform. A part of the writers have been resigned to this splitting of the contract.\textsuperscript{141} The Swiss Federal Tribunal espoused the theory,\textsuperscript{142} and Dicey extended his advocacy of the \textit{lex loci solutionis} to this application of two substantive laws.\textsuperscript{143}

To exemplify the effects of this “splitting theory” or “two laws system” on the most important contract, sales of goods, in the absence of a presumed intention of the parties, the obligations of seller and buyer are to be distinguished, as well as their several duties. A separate place of performance may exist, and hence a different law apply to the seller’s duties to deliver the goods, to be liable for warranties and conditions,\textsuperscript{144} or default,\textsuperscript{145} and to replace

\begin{itemize}
\item SAVIGNY 200, 202, § 369.
\item WINDSCHEID, I Pandekten § 35 No. 3.
\item 2 Bar 15.
\item Cases collected by LEWALD 246-256.
\item See LEWALD 246. Also the writers advocating the law of the nationality or domicile of the debtor are satisfied with a similar bisection, see \textit{infra} n. 175.
\item Switzerland: BECKER, 5 Gmür 294 § 312 V n. 20; 304 §§ 319-362 II n. 2.
\item DICEY (ed. 5) 675; the latest edition, DICEY (-KAHN-FREUND) 746 restricts this rule to exceptional cases.
\item RG. (Oct. 21, 1899) JW. 1899, 751; OLG. Hamburg (April 14, 1905) 12 ROLG. 58, 16 Z.int.R. 322.
\end{itemize}
defective merchandise. Again, the existence and effect of the various duties of the buyer depend on the laws at the places where he has to pay the price and accept the goods, accept a substitute, examine the goods, and give notice. But also the remedies a buyer has on the ground of defects and nondelivery, have been subordinated to the law determinative of the obligation to pay.

These and other scholastic and unsound results have been harmful to the reputation of lex loci solutionis.

German courts themselves have become uneasy of this artificial play and admittedly try hard to avoid it in particular cases by presuming an intention of the parties in favor of an all-inclusive law. The Swiss Supreme Court seems to deny to the adopted principle almost any practical influence.

In fact, this principle is based on the mistaken conception that a bilateral contract can be reasonably partitioned into two unilateral obligations. This conception may be excused in earlier stages of Roman and English jurisprudence; it was largely superseded by the late Roman law, and has been entirely abandoned in modern law. The very nature of a synallagma is ignored when a sales contract is torn up into halves

146 RG. (April 19, 1910) 73 RGZ. 379, Revue 1911, 403.
147 RG. (Nov. 18, 1899) JW. 1900, 12 No. 5; OLG. Jena (Dec. 31, 1917) JW. 1918, 380 No. 5, stressing the local connection of each litigious obligation; cf. 55 RGZ. 423; 65 id. 332. Similarly, as to the portions to which each of several buyers is obligated, OLG. Jena (June 30, 1897) 8 Z.int.R. 335, Clunet 1899, 608.
148 RG. (Oct. 13, 1894) 34 RGZ. 191.
149 RG. (April 28, 1900) 46 RGZ. 193, 195; (April 19, 1910) 73 RGZ. 379; (Feb. 4, 1913) 81 RGZ. 273, 275; for details, see LEWALD 254 ff. According to OLG. München (Feb. 16, 1928) IPRSpr. 1928 No. 33, the duty of notice is subject to the law of the domicil of the buyer.
150 RG. (June 16, 1903) 55 RGZ. 105; (April 26, 1907) 66 RGZ. 73; (May 25, 1932) IPRSpr. 1932 No. 33.
151 RG. (May 27, 1924) IPRSpr. 1926/27 No. 43.
152 See citations infra n. 169. See also Fiore § 120; Pilet, 2 Traité 263 (against Savigny's emphasis on the place where jurisdiction will be taken); Alcorta, 2 Der. Int. Priv. 314; Matos 457 § 330. For other difficulties, see LEWALD § 284.
153 RG. (April 4, 1908) 68 RGZ. 203, 207; (Jan. 27, 1928) 120 RGZ. 72.
154 Niederer, 60 Z. Schweiz. R. (N. F.) (1941) 268a-265a; see also Gutzwiller, id. 415a; add G. (Oct. 21, 1942) 68 BGE. II 220, 223.
belonging to different legislations. No wonder that recent criticism has discovered a number of contradictions and inconveniences, and has stated that rescission of a contract and risk for fortuitous loss of the goods cannot be classified properly, and that in truth the alleged law of one party was applied to both.  

The Anglo-American courts seem never to have thought of such consequences of the place of performance theory, and with the exception of Dicey, no writer has entirely followed the German example.

If, however, we become aware that not the several duties but the whole contract is to be connected with the law of some state, it must also be realized that by making the “place of performance” the determinative concept, we are far from meaning the domestic concept bearing the same name. Indeed, in progressive suggestions the whole of the contract has been localized at the place where the *typically* prevailing, or principal, contractual duty should be discharged. It has also been suggested that a new uniform concept of place of performance should be established for the entire contract rather than for the duties created by it. But even this may turn out to be too narrow a formula. Another step farther, Strisower has advocated that the place of performance should be deemed to be found, not at the place where performance ought to be made in fact but the place where, according to the nature of the obligation, the “social sphere

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156 To this effect already ROHG. (Dec. 9, 1875) 19 ROHGE. 132.

157 See Neuner, 2 Z. ausl.PR. (1928) 121; Lewald 249 No. 309; Rabel-Raiser, 3 Z. ausl.PR. (1929) 77.

158 Neuner, id. 123.

159 See supra n. 143.

159 Homberger, Obl. Verträge 49, 50; BG. (Oct. 21, 1947) 67 BGE. II 181.

160 Nolde, 32 Annuaire (1925) 504; Lewald 248; for other literature, see Batiffol 83 and infra p. 474 n. 169.

161 In the opinion of Batiffol 87, this is the existent rule in the United States.

162 Neuner, 2 Z. ausl.PR. (1928) 130; followed by Niederer, 60 Z. Schweiz. R. (N. F.) 242 a; Oser-Schoenenberger p. LVII No. 57.
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is centered in which the obligation is to be discharged.

More simply we should say that the center of the obligation rather than the place of its discharge is the adequate contact for choice of law.

To take an example, it is an excellent rule that employment contracts should be governed by the law of the place where the employee is expected to do his work. This rule is amenable to the theory emphasizing the place of performance of the outstanding obligation established in such a contract. But whoever would be satisfied with this aspect of the rule must be embarrassed by the case of a traveling salesman visiting a dozen states according to the varying instructions of his employer. Again, there is prevailing agreement that in this latter case the law of the employer's domicil governs. In both cases, however, the selected localizations are convenient for determining the center of the particular type of contract.

5. Lack of a Certain Place of Performance

It does not often happen in normal commercial sales, loans, or bailments that the parties are unable to ascertain at the time of contracting at what place the duties are performable. When, however, insurance payments or life rents are made payable at the domicil of the creditor, his changes of domicil are decisive. Bonds may be payable in any of several countries at the option of the bondholder. Goods may be shipped to a destination to be declared during the carriage. Or a vessel, plying on the ocean, is bought with the stipulation that it should be conveyed to the purchaser at its next port of call. As mentioned before, in such cases it has been suggested that as a measure of despair, the lex loci contractus may be applied. Resorting to a more logical method, courts regarding the lex loci contractus as starting point, sometimes

163 Strisower, 32 Annuaire (1925) 507.
164 Case referred to by 2 Bar 10 n. 9.
will say that where there is no place of performance, the court cannot do better than fall back on the general rule that *lex loci contractus* governs. The 1940 draft of Montevideo (art. 40), expressly provides that if the parties cannot, at the time of contracting, determine the place of fulfillment, the contract is governed by the law of the place of contracting. All these are makeshift constructions.

6. Characterization

Courts have been taught to determine the place of performance according to their *lex fori*. The German Reichsgericht strictly observing this method, considers neatly two successive phases, first inquiring where the German municipal law locates performance, in order to find the applicable law; and when this law is found, inquiring where performance is due under this law, in order to decide the claim.

*Illustration.* D in Zürich, Switzerland, owes money to C in Berlin. Under the German Civil Code, § 270, the debtor has to send the money at his own cost and risk to the creditor, but nevertheless Zürich is his "place of performance." This means that if the mail is delayed en route, he is not in default (78 RGZ. 140). But applied to the conflicts matter, it means that Swiss law governs the debt. Consultation of the Swiss Code of Obligations will result in finding that the place of performance is with the creditor in Berlin. Therefore, by delayed mail the debtor is in default after all, therefore liable for interest and in certain cases for rescission, although not for other damage. (C. Obl. art. 74 (1), 106 ff.)

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165 See for instance, Morgan v. New Orleans M. & T. R. Co. (1876) 2 Woods 244, 17 Fed. Cas. 754 No. 9804; Oakes v. Chicago Fire Brick Co. (1941) 388 Ill. 447, 58 N. E. (2d) 460. The main advocate of this rule at present is Batiffol 85 § 94.

166 BGB. §§ 269, 270. Many German writers following Leonhard, Erfüllungsort und Schuldort (1907), however, refer these sections directly to conflicts law. Melchior 171 virtually concludes from this view that the courts have no choice other than to apply them.

167 ROHG. (1875) 17 ROHGE 292; (1877) 22 id. 296; RG. (March 11, 1919) 95 RGZ. 164, and constant practice, see Melchior 172 n. 1, 173 n. 2.
The Swiss Federal Court, professing the same method, if consistent, must reach the opposite result in favor of German law. This is a wonderful example to demonstrate Bartin's thesis that harmony is impossible. But more and more, we may wonder whether any "place of performance" can fulfill its pretended function.

7. Rationale

The opinion is well-reasoned that performance has in many cases more significance in the eyes of parties to a contract than the locality where they declare their consent, if such a common locality exists. However, the former enthusiasm for this variant of the old doctrine has not stood up against accumulated criticism. The place of performance may happen to be as accidental or insignificant for choice of law as any other place involved; as when an English and an American merchant engage in a transaction to ship meat from Argentina to Egypt; or Americans agree with one another for sea carriage to Venezuela; or when a traveling salesman is hired to go to distant countries.

Such fruits of the theory of place of fulfillment resulting in bisection of bilateral contracts are particularly objectionable. They cannot be removed by a fictional pretension that a contract producing two main obligations of different location has only one place of performance. The relations between creditor and debtor are often necessarily localized at more than two places. Conflicts law cannot schematically rely on such a device.

168 The Swiss Fed. Trib., in fact, resorting to lex fori for defining the place of performance in its decision (Oct. 11, 1918) 44 BGE. II 416, 417 applied the law of the creditor's Swiss domicil, but applied the domiciliary law of the debtor, being again Swiss law in BG. (July 3, 1909) 35 BGE. II 473, 476, 20 Z.int.R. 102. Thereby it managed both times to apply the law of the forum.

169 See 2 BAR; 2 MEILI 8; 2 ZITELMANN 372; ROGUIN, Actes de la 3ème Conférence de la Haye (1900) 62; ALMÉN, I Skandinav. Kaufrecht 52; LEWALD 226, 227.

170 F. LEONHARD, Erfüllungsort und Schuldort 123 has very well noted this point.
Lex loci solutionis without more qualifications, is as insufficient a test as the lex loci contractus.

IV. LAW OF THE DEBTOR’S DOMICIL

A subsidiary rule based on the nationality of the debtor, postulated on a priori axioms,\textsuperscript{171} has been commonly rejected.\textsuperscript{172} But the law of the domicil of the debtor functioning as a general rule, has found increasing favor with writers.\textsuperscript{173} The principal arguments are that a debtor cannot be presumed to have promised more than his habitual law makes him liable for, and that his domicil is the place where he may be sued and his assets are legally concentrated, according to the most fundamental principles of jurisdiction and enforcement. That in most cases he is in fact sued at that forum and the domiciliary law then coincides with lex fori, is claimed to be another advantage.

Adversaries\textsuperscript{174} object that the domicil of the debtor has no title to govern acts of performance in another country, and that there is no reason why the domicil of the debtor should be of more significance than that of the creditor. The dismemberment of a bilateral contract seems even more difficult to avoid with this than with the doctrine of the place of performance; the advocates of the personal law realize this and approve of the splitting.\textsuperscript{175} Where a buyer refused payment, while another buyer paid the price in advance, and

\textsuperscript{171} 2 ZITELMANN 372; 2 FRANKENSTEIN 126.
\textsuperscript{172} RG. (March 11, 1919) 95 RGZ. 164; (Oct. 3, 1923) 108 RGZ. 243; E. ISAY, 14 Z. f. Völkerrecht (1928) 254.
\textsuperscript{173} 2 BAR 12; REGELSBERGER, Pandekten § 44 n. 4; HARBURGER in 22 Annuaire (1908) 114; NEUMEYER in 32 Annuaire (1925) 99 No. 3; STRISOWER in id. 91, cf. 135; GUTZWILLER 1608 n. 1; LEWALD 230 No. 287; FRITZSCHE, 44 Z. Schweiz. R. (N. F.) 254a; RAAPE, IPR. 451 (regarding this theory as probably dominant in the German literature); ALMÉN, 1 Skandinav. Kaufrecht 54 n. 68 citing other Swedish followers.
\textsuperscript{174} See LORENZEN, 30 Yale L. J. (1921) at 667; BATTIFOL 100.
\textsuperscript{175} It has been adopted by 2 ZITELMANN 405; MITTEIS, 4 Verhandlungen des 24. Deutschen Juristentages 98; 2 FRANKENSTEIN 190, 295 ff.; NEUMEYER, IPR. (1929) 27; BAGGE, Conférence de la Haye, Actes de la sixième session, at 289.
both rescind, there develop curious differences between the applicable laws, because the second purchaser has changed his position from debtor to creditor.\[176\]

In legislation\[177\] and courts,\[178\] this approach has not had much following. Lacking the historical background of the \textit{leges loci contractus} and \textit{loci solutionis}, it has no better rational justification than these for dominating by itself all contracts.

It is another matter that the domicil of a party, being the basis of his status, has been said to furnish a last resort, if the requirements of all other conflicts rules fail. In this respect, we shall discuss\[179\] cases such as that of a merchant who sends out a catalog intending, under his domiciliary law, to invite customers to make offers, while at the places of receipt the catalog is regarded as an offer; or cases concerning the different appreciation of silence as acceptance or denial of an offer.

V. THE LAW MOST FAVORABLE TO THE CONTRACT

Inspired by earlier theories, the Austrian Code of 1811 has a special rule referring to the personal law of a foreigner making a gift within the country, if the gift is valid under such law rather than under the otherwise applicable

\[176\] Almén, I Skandinav. Kaufrecht 55, vainly tries to justify this difference.

\[177\] Poland: Int. Priv. Law, art. 9 (as to unilateral contracts); applied to loans, Polish S. Ct. (Nov. 18, 1936) 4 Osteurop. R. (N. F.) (1937-38) 380.

\[178\] Czechoslovakia: Law of 1948 on private international law, § 47 (unilateral contracts).

\[179\] See infra Chapter 32, p. 524 n. 19.
lex fori.\textsuperscript{180} Argentina\textsuperscript{181} and Nicaragua\textsuperscript{182} conversely provide for application of their own laws, when they are more favorable to the validity of transactions than the foreign laws called for by the conflict rules. In England and America, Lord Phillimore's words have often been repeated that "the parties cannot be presumed to have contemplated a law which would defeat their engagements"—an application of the maxim, \textit{ut res magis valeat quam pereat}.\textsuperscript{183} Mr. Justice Matthews speaking for the Supreme Court of the United States appropriated this consideration as

"... a circumstance highly persuasive in its character of the presumed intention of the parties and entitled to prevail unless controlled by more express and positive proofs of a contrary intent."\textsuperscript{184}

The illustrative English cases using this argument involve an arbitration clause, valid under English law at the place of making, invalid under the Scotch law of the place of performance,\textsuperscript{185} and clauses exempting a ship company from liability.\textsuperscript{186} Similar stipulations of carriers\textsuperscript{187} and of some insurance companies\textsuperscript{188} have been treated to the same effect in this country. The Supreme Court of the United States has applied it to a bond void for lack of consideration where

\textsuperscript{180} Allg. BGB. § 35; cf. Prussian Allgemeines Landrecht I 5 § 113 (applied by RG. (March 15, 1900) 46 RGZ. 230 to the form of a gratuitous discharge).

\textsuperscript{181} Argentina: C. C. art. 14 (4).

\textsuperscript{182} Nicaragua: C. C. art. VIII No. 4.

\textsuperscript{183} 4 PHILLIMORE § 654; followed by WHARTON § 429; obiter dictum in South African Breweries, Ltd. v. King [1899] 2 Ch. 173, 181.

\textsuperscript{184} Pritchard v. Norton (1882) 106 U. S. 124, 137.

\textsuperscript{185} Hamlyn & Co. v. Talisker Distillery [1894] A. C. 202; 6 R. 188—H. L.

\textsuperscript{186} Pensular and Oriental Steam Navigation Co. v. Shand (1865) 3 Moo. P. C. Cas. (N. S.) 272, 290; \textit{In re Missouri Steamship Co.} (1889) 42 Ch. D. 321.


made but valid where to be performed. One case concerns the capacity of a married woman, two others, oral transactions. The argument has more often been used in usury cases, although even there in less than twenty-five per cent of the cases, and occasionally with respect to other causes of illegality. A few instances of analogous reasoning exist in decisions of other countries.

On the other hand, neither in England nor in this country can any consistent judicial doctrine be stated in this sense. Often the argument was unnecessary and served to support the escape from *lex loci contractus* or *lex loci solutionis*. In the cases concerning capacity, favor of validity would seem adequate but has hardly ever been openly and decisively granted.

Nevertheless, it provokes thought that the preference of the more favorable law has found considerable support in the literature, particularly in this country. What can theo-
retically justify such a view? How could it be formulated?

In its nature, distinctly emphasized by the English writers, the selection of the validating law has been dependent upon the assumed intention of the parties. Indeed, the argument demands not only a so-called presumptive intention but a real, though tacit, agreement of the parties; by stipulating as they did, they wanted to adopt the law under which the stipulation would be valid. But this reasoning is frustrated by the doubtless correct thesis that where the parties agree on a certain law, this law applies even though it nullifies the contract.201 Batiffol, who seems to refer the doctrine in question to the hypothetical intention of the parties, is only prepared to regard it legitimate, where, at the time of the contract or at least before one of them invokes nullity, the parties knew that one law annuls and the other validates their stipulation, and expressed their knowledge by their conduct.202 But the cases state at most that the parties may be supposed to have known the law. Cheshire has abandoned the whole idea.203

If the proper law theory is rejected, what should be the idea, or the content, of the rule? We have seen that no rule exists prescribing that a contract is void, if it is contrary to any one of several laws "substantially" connected with it. On the other hand, could a rule be really acceptable, which says that whenever a contract is connected with several jurisdictions, we cannot hold it void except when its nullity is assured by all of them? Certainly not.

In reality, the casual popularity of the law upholding the contract in the American courts is very closely related to their unprincipled conflicts practice. On the one hand, rules

Ch. 29); Stumberg 237, 240: "To apply the law which will uphold the contract, if the contract has some bona fide substantial connection with the place of that law, would, it is believed, in carrying out the purpose which the parties had in view in their negotiations, better serve business convenience by making their acts legally that which they purport to be; i.e., an enforceable promise."

201 Infra Chapter 32.
202 Batiffol 138 § 156.
203 Cheshire 212, as compared with (ed. 2) 269 and (ed. 1) 196.
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are allegedly traditional and fixed; a court believes to a certain extent in the *lex loci contractus* or in another device. On the other hand, nothing is really certain; the courts experiment; they are benevolent to a party who appears to deserve protection; they do not want, in particular, to allow a right to be frustrated by a local statute, either outmoded or having no reasonable claim to govern exclusively an inter-state transaction. Very clearly, the courts in general do not favor the peculiarities of state provisions on Sunday contracts, statute of frauds, usury, or the formalities of insurance policies. The Wisconsin Supreme Court, speaking of a sale made in its own territory without a memorandum in writing, discards the law of the place of contracting and its rule of unenforceability, stating there is "nothing inherently bad about such convention, despite our statute of frauds," and the contract is declared valid under the foreign law of the place of performance. 204 The usury cases, a very particular phenomenon, are inspired by mutual tolerance as there are many ways to solve the problem. The courts desire to free legitimate business from dispensable local impositions. A finance corporation has carried on its loan business for fifteen years, has used the same type of stipulations as other companies, for customers in all jurisdictions. Why should such a usual and standard form be stigmatized as fraudulently evading the law of the debtor's domicil or the law of the forum? 205 The courts manifestly think that one system of regulating the rates of interest is as good as another. They weigh and compare the needs and policies. Their final choice is not so much meant to favor the validity of the contract as to encourage the reliance of trade and commerce on inter-state protection. The solution would be strictly contrary, if a prohibition were violated comprising a basic requirement in a state to which the contract should exclusively belong.

204 Canale v. Pauly, *supra* n. 191.
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These considerations include several particular circumstances, which do not often occur in international transactions and even in the relations among the American sister states strongly restrict the application of the principle in question. Equivalence and comparative unimportance of local policies is one of these considerations. Another is the equivalence of various conflicts rules to be used at pleasure. A third is the neglect of party choice by both courts and parties, and a fourth the replacement of one determined applicable law by a number of laws among which any one may be selected. This orbit of legal systems is circumscribed by the fortuitous connections the parties establish. But to prevent the parties from too much arbitrariness, it is required that they observe some limits which, in general, are not defined more closely. Only one limit has been settled in the usury cases: the law of the charter state of the lending corporation is excluded, if the actual place of business is elsewhere. Hence, if a court should find that the system of differentiated rates of interest in the charter state is superior to the statutes of the debtor's domicil as well as to those of the actual business place and the situs of a mortgage, it still would not be allowed to apply that law even though the parties may have expressly stipulated for it.

After all, it is not incidental that the principle of the upholding law has not seriously been applied to the bulk of the American contracts cases, not to speak of the international practice.

In the opinion of the writer, the advocates of this principle seem to feel quite correctly that something is needed, in the chaos of uncertain and unsatisfactory conflicts rules, to obviate the sacrifice of honest commerce. The spontaneous inclination of courts to safeguard contracts from local prohibitions serves as an excellent emergency device, and as such is to be recommended. If every type of contract were to be
endowed with a stable subsidiary conflict rule adequate to the nature of the contract, and if the parties were plainly permitted and encouraged to select the governing law, with assurance that it will be applied, neither the parties nor the courts would be in need of such subterfuges; and the legislatures would not have to tolerate them.

VI. RENVOI

If a court presumes that the parties have had a certain law "in view," it is reasonable to think that this law is a substantive, municipal, law. But also if judges are supposed to choose a law amenable to the character of the contract, it seems a useless detour to select a conflicts law instead of a municipal law. Only in case a mechanical rule points to the law of a certain place whereas the court of this place would instead apply a third law, does renvoi have its usual significance. This is the reason why German courts have repeatedly resorted to references from the law of the place of performance to another law, or in suits for carriage by sea, from the law of the port of discharge to the law applied at this port. In a case where two Austrian nationals living in Turkey entered into a contract of employment, the Italian Supreme Court applied their common national law and, by transmissive renvoi from the Austrian conflicts rule, the law of Turkey.

VII. CONCLUSIONS

I. Specialized Rules

The negative result reached by some modern authors is

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206 Melchior 239, citing OLG. Kolmar (May 19, 1893) 4 Z.int.R. 151.
207 Swiss BG. (Oct. 21, 1955) 81 BGE. II 391, 394. See Melchior, JW. 1925, 1571 and Haudek 94 against Lewald 206.
208 RG. (Jan. 23, 1897) 38 RGZ. 140, 146; (Oct. 11, 1907) 19 Z.int.R. 222, 224, and others, see Melchior 239 n. 2. BGH. (Feb. 18, 1958) NJW. 1958, 750, Rev. Crit. 1958, 542.
209 RG. (April 4, 1908) 68 RGZ. 203, 210 (incidentally).
unimpeachable. No one conflicts rule can serve for all obliga-
tory contracts. A wrong method had developed when writers,
enactments, and judicial decisions tried to apply either always
the law of the place of contracting, or always the law of the
place of performance, or always the personal law common
to the parties, or that of the debtor, or always to connect the
making of the contract with one place and its effects or
performance with another place. All these doctrines have
thoroughly failed.

A more attractive method is that of carefully investigating
and following up the presumable intention of the parties.
But where a real, though tacit, agreement of the parties is
lacking, such quest turns into a search for the most appropri-
ate connection between the dispositions of the parties and a
territory. Clues hinting at the law the parties might have
had in mind, are certainly not negligible; yet they have to
be integrated into the entire circumstances.

What, however, is the positive gain of this dispute? If all
mechanical rules are repudiated, does this mean that the
circumstances of every single contract should be examined
to find the most closely connected law? Some authors, led
by their regard for the hypothetical intention of the parties,
come near to such a view. Others want to recognize every
substantial territorial contact. In the United States, a place
has been sought where the law is most favorable to the va-
validity of any obligation. Each of these suggestions contains
valuable material. But at the same time, the viewpoint of
the practical lawyer has been recently stressed by Griswold’s
opposition to Cook’s apparently unlimited dissolution of
fixed conflicts rules211 and Cavers’ doubt whether the nega-
tive criticism on Beale’s rigidly dogmatic rules does not leave
judges helpless.212

211 See the reply by W. W. Cook, 21 Can. Bar. Rev. (1943) 249 and in 37 Ill.
L. Rev. (1943) 418.
212 Cavers, supra n. 106.
This reaction is sound, not implying a reproach to the necessary clarification, but a suggestion for future policy. If we could do no better than refer the courts to their own estimates of what is in every single case the most closely connected law, or what is appropriate to the case at bar, the judges would soon fall back on their formulas.

A margin of judicial discretion, of course, must remain so as to do justice to peculiar forms of contracts and individual mentalities of parties. But roughly speaking, we need a developed system of conflicts rules on contracts, rather than just one or two rules, and we have to build it not on rules so vague as to abandon the judge regularly to his worry or fancy, nor on specifications so tight as to omit important kinds of agreements. This program requires comparative research in the municipal laws and in commercial practice with respect to each single type of contract, a work so far only partially started. Experience, however, seems to show that commerce is served by a number of standard forms, with newly devised clauses rapidly imitated throughout the world. In the vast domain of sales of goods, differences in stipulations are caused much more often by the natural differences of merchandise sold than by local or national predilection. Insurance, banking, carriage of goods contracts may be distinguished in analogous groups under rational rather than local criteria. For this and other reasons, it may be less difficult than appears at first sight to resolve the local attachments most characteristic of the individual groups of contracts.

However, that not inconspicuous pains must be taken, can be seen in the quick defeat of the proposed special rules for various contract types, in the Institute for International Law. Divergences of opinion were declared too profound, and, indeed, many members were devoted to the principle of nationality and hostile to party autonomy, prejudices which
in themselves could wreck any international enterprise. In addition the Institute stated that the matter was immature and deferred discussion for an indefinite time. Lists as sketched in the reports to the Institute, in the Polish law, or in the Montevideo Treaty are the unconvincing product of divination rather than inquiry. Comparison of the actual choice of law decisions in the Anglo-American, French, and German courts, meritoriously begun by Batiffol, gives some very valuable suggestions but no comprehensive certainty. On the other hand, the successive drafts of conflicts rules determining sales of goods elaborated in the International Law Association and committees of the Sixth Hague Conference, show remarkable progress. The work to be done is indeed vast. The present writer, in fact, does not believe himself able, in a lonely study, to do more than to point out a few examples and to suggest some methods of research.

2. The Law of the Contract

The task ahead will be to aim at ascertaining, in case the parties do not themselves choose their law, of what the main local connection is under given conditions, or to express it shortly:

In what jurisdiction a certain type of contract is centered.

If the elements of the contract in question allow it, its connection with one law is very desirable. Almost all modern writers are agreed on this point. To split the incidents in the manner of the Restatement and, formerly, the Swiss Federal Tribunal, or in that, formerly, of the German Supreme Court, is a grievous mistake, as was shown and will appear again later. That various obstacles that have been raised in the literature to the application of a unique law to this or that incidental problem are unfounded, will be discussed in Chapter

213 33 Annuaire (1927) III 224ff.
214 See the last draft in 7 Z.ausl.PR. (1933) 957.
32. Formalities, it is true, should be treated with some liberality (Chapter 31), while capacity should not be distinguished. In the conviction that "dépeçage," division, is bad and unity of contract is precious, we have been confirmed by a powerful lesson received from comparative research. The various legal systems operate with different terminologies and techniques, but in the hands of fair judges they usually work out all right and to strikingly similar ends. To maintain such satisfactory machinery, however, we have to leave to one system the entire living situation. Mixing several municipal provisions is quite likely to jeopardize justice.²¹¹

Of course, there are certain types of contracts, such as, for instance, international loans with separate issues of "tranches" in several countries and "payable" at several places, with respect to which it would be a forced method to ignore the several laws involved. There are also certain incidents such as the examination of goods sold and delivered, or the time and manner of payments, which are conveniently governed by special laws.²¹⁶ Hence, it is generally the lex contractus, or as we shall term it, the law of the contract, that must be found. By exception we have to recognize either more than one law of the contract, or in addition to this law, a special law.

²¹¹See Ed. Wahl, 3 Z. ausl. PR. (1929) 782.
²¹⁶In continental Europe called statut spécial, Nebenstatut.