CHAPTER 31

Form of Contracts¹

I. THE RULES

1. *Lex loci contractus*

The original doctrines of the statutists included in the validity of a contract form as well as substance. Hence, the law of the place of contracting, whether considered as governing the entire contract or at least its validity, covered the formalities for completing a valid agreement, and it may be inferred that this very application has always given the principle of *lex loci contractus* its most convincing aspect. This ancient doctrine has retained its full vigor in the basic American conflicts rule which, to believe Beale, still prevails. According to the Restatement (§ 331, b), the law of the place of contracting determines the validity of a promise, as in other regards, also with respect to "the necessary form, if any, required to make a promise binding."

2. *Locus regit actum*

In the main development of the statutist doctrine, the significance of the maxim, *locus regit actum*, from the sixteenth century on was reduced to the problems of form.² The idea that an obligation originates in the territory of a sov-

¹ (The form of negotiable instruments will not be included in the following chapter, except by occasional mention, since this topic warrants a separate discussion; see Vol. 4 ch. 59.)

Edouard Silz, *Du domaine d'application de la règle "locus regit actum"* (Paris 1933); Rheinstein, 4 Rechtsvergl. Handwörterbuch 360-371; L. I. Barmat, *De regel "locus regit actum" in het internationaal privaatrecht* (Amsterdam 1936).

² On the history of the rules concerning formalities, see Waechter, 25 Arch. Civ. Prax. (1842) 368, 405; Savigny § 382; 1 Bar 337; Neumeyer, 2 Gemeinrechtliche Entwicklung 84, 87, 135; E. M. Meijers, Bijdrage tot de geschiedenis van het int. privaat- en strafrecht (1914) passim.

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ereign and therefore depends on the conditions imposed there, retained greater force in application to the exterior conditions of contracting than for the capacity of the parties. Others deduced the maxim from voluntary submission of the parties, or from a general customary law. But finally, writers have emphasized reasons of convenience, viz., that parties are in the best position to learn what formalities the local law prescribes and can readily adjust themselves to these; that they are not interested in other forms for their own sake; and may well be uncertain with which law they should otherwise comply. ³

(a) Compulsory rule. The theory that a contract is “born” in a territory drew with it the logical necessity that the local prescriptions govern the form. Hence, locus regit actum acquired compulsory force. Whatever law may govern the contract in other respects, the law of the place where it is made always determines whether any formalities are obligatory, and if so, which are required. In this shape as imperative, the rule was recognized for a long time in England, ⁴ and appears in a number of countries. ⁵ The French courts, until

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⁴ Alves v. Hodgson (1797) 7 T. R. 241; República de Guatemala v. Nuñez [1927] 1 K. B. 669, 691, both leading cases concerning the want of a stamp locally required at a foreign place; WESTLAKE 281 § 209; DICEY (ed. 5) 641 Rule 159(2) recognized in the latest edition as permissive, DICEY (KAHN-FREUND) 774 Rule 152; FOOTE 388.

Canada: Former Quebec practice: Furniss v. Latocque (1886) 2 Montreal L. R. S. c. 405 (erroneously cited by DICEY (ed. 5) 642 n. 2 as existing law).

⁵ Argentina: C. C. art. 12 and art. 916 (new 950), cf. 2 VICO 280-285, §§ 346-348, and cases collected by 2 ROMERO DEL PRADO 306-310.

Bolivia: C. C. art. 36.

Brazil: Introd. Law (1916) art. 11; but see infra n. 10.

Chile: C. C. art. 17.

Colombia: C. C. art. 21.

Cuba: C. C. art. 11 par. 1; C. Com. arts. 51, 52.

Guatemala: Law on Foreigners, 1936, art. 24 sentence 2.

Honduras: C. C. art. 15.

Iran: C. C. art. 969.

The Netherlands: Allg. Bepalingen (1829) art. 10 according to the dominant opinion criticized by JITTA 138; KOSTERS 185; OFFERHAUS, “The Private International Law of the Netherlands,” 30 Yale L. J. (1920) 116, but historically
1909, were divided on the question.⁶

Transactions before consuls in foreign countries, of course, follow the forms provided by the domestic law of the consul’s state.

(b) Optional rule. In a part of the old literature,⁷ however, and in the course of the nineteenth century under Savigny’s influence,⁸ the rule was more and more regarded merely as a favor to the parties, as a permission to use the local formalities or formlessness.

In a first variant expressing the rule, the *lex loci contractus* was still given first place. The contract, as was said, should be valid also if complying with the law governing the contract as a whole.⁹ Later, this order was reversed. The German Introductory Law in 1896 formulated the rule thereafter prevalent:

Art. 11(1) The form of a transaction is determined by the laws governing the legal relation that constitutes the grounded, see BARMAT, supra n. 1, 157. The Supreme Court, H. R. (Dec. 6, 1928) N. J. (1929) 465 avoided a direct answer.
Peru: C. Com. art. 52 but see infra n. 10.
The Philippines: C. C. art. 17 par. 1; but for permissive interpretation SALONQA 330.
Portugal: C. C. art. 24; C. Com. art. 4 (3) (doubtful).
Puerto Rico: C. C. art. 11; C. Com. art. 83 n. 2.
Rumania: Some decisions, see PLASTARA, 7 Répert. 77 No. 255.
Spain: C. C. art. 11 par. 1 (for public acts) generalized in the literature, see TRÍAS DE BES, 6 Répert. 245 No. 65 and Revue 1927, 23, 27 who recognizes only certain exceptions. Accord, CASTAN TOBENAS, 1 Derecho Civil Español (1943) 101.
Switzerland: Formerly all problems of validity were governed by the *lex loci contractus*, see supra p. 399 n. 16. In its decision reversing this rule the Federal Tribunal expressly excepted questions of formalities from the uniform law of the contract, BG. (Feb. 12, 1952) 78 BGE. II 74 at 86.
Venezuela: C. C. art. 11 par. 1.
On the scope of some of these provisions, see infra n. 35.
⁶ For imperative character: Cour Paris (May 25, 1852) S. 1852.2.289, aff’d, Cass. (req.) (March 9, 1853) S. 1853.1.274, D. 1853.1.216 and others, cited by NIBOYET 676 § 553.
⁸ See the learned report by the Procureur Général Baudouin, in the case, Gesling v. Viditz, infra n. 10, Clunet 1909, 1097, 1113; cf. STORY § 262, notes.
⁹ SAVIGNY § 381 note (p) with references to older authors.
subject of the transaction. It is sufficient, however, to observe the laws of the place where the transaction is made.

(2) The provision of paragraph 1, sentence 2, shall not apply to a transaction by which a real right is created or disposed of.

In other words, the "lex causae" is considered as governing in the first instance; but if its formal requirements are not fulfilled, validity is saved by compliance with the local law.

This optional or permissive function of _locus regit actum_ has been adopted in the vast majority of modern doctrines and enactments.\(^\text{10}\) It has also been claimed to be the existing

\(^{10}\) Canada, Quebec: C. C. arts. 7, 776, as construed by the Supreme Court of Canada, Ross v. Ross (1893) 25 Can. Sup. Ct. 307.
Austria: OGH. (Nov. 20, 1894) GIU. No. 15301; 1 Ehrenzweig-Krainz 109; Walker 233.
Brazil: Former Introd. Law (1916): prevailing interpretation. See C. Bevilaqua, 1 C. C. Com. 133, obs. 1; Bevilaqua 258; 1 Pontes de Miranda 528; Espinola, 8 Tratado 584ff.; Carvalho Santos, 1 C. C. Interpret. 154 and others (against a small minority of writers); and the great majority of court decisions, see more recently, App. Fed. Distr. (Sept. 14, 1933) 28 Arch. Jud. 473; App. São Paulo (Jan. 16, 1941) 130 Rev. Trib. São Paulo 655.
Introd. Law (1942) art. 9 § 1, as commented upon by Espinola, 2 Lei Introd. 586; Serpa Lopes, 2 Lei Introd. 347. Contra: Tenório, Lei Introd. 337.
Costa Rica: C. C. art. 8.
Czechoslovakia: Law of 1948 on private international law, §§ 7, 8.
Denmark: Borum 84.
Egypt: C. C. art. 20.
France: Cass. (civ.) (July 20, 1909) Gesling v. Viditz, D. 1911.1.185, S. 1915.1.165, Clunet 1909, 1907, Revue 1909, 900, recognizing validity of a will under the testator's national law, but this is extended in the literature to all contracts (Niboyet 677 § 553, Lerebours-Pigeonnière 259 § 247; Batifol, Traité 629) and to every lex causae (Batifol 366-367 § 429 against other writers); App. Alger (May 26, 1919) Revue 1921, 117, Clunet 1920, 241 (will); Trib. civ. Seine (Feb. 23, 1921) Revue 1922, 622.
Germany: EG. BGB. art. 11; similarly, the former German common law: App. Rostock (Nov. 12, 1866) 24 Seuff. Arch. No. 185; RG. (April 27, 1881) 37 Seuff. Arch. No. 1; RG. (July 7, 1883) 14 RGZ. 183.
Greece: C. C. art. 11.
Italy: Disp. Prel. (1942) art. 25.
Japan: Int. Priv. Law, art. 8.
Norway: See Christiansen, 6 Répert. 571 No. 85.
Peru: C. C. art. XX.
Poland: Int. Priv. Law, art. 5.
Siam: Law of 1939 on private international law, §§ 9 par. 1, 13 par. 3.
Soviet Union: Probably, Makarov, Précis 253.
Sweden: See Malmar, 7 Répert. 135 § 100; Nial 47.
Syria: C. C. art. 21.
If we say that the parties are permitted to use the local form, this does not necessarily require that they actually know the differences of formal prescriptions or intentionally prefer the usages at the place where they happen to be. Although there were statutist writers who explained the rule, *locus regit actum*, by self-subjection of the parties to the *consuetudo loci*, it is well settled everywhere, excepting a recent ill-advised English decision, that the rule in any version operates independently of the intention of the parties.

In either variant, at present, the scope usually is extended to all transactions of private law with definite exceptions. Thus, the German provisions except transactions modifying the title to property, subjecting them to the *lex situs*. However, agreements to convey property, including immovables, in modern law generally follow the rule, *locus regit actum*. But the Polish law and the Swiss doctrine and others also refer to the *lex situs* obligations entered into to transfer or to constitute rights in immovables situated in the forum. These are rather regrettable rules, inviting conflicts to the detriment of the parties acting in good faith.

Most codes, moreover, contain special rules for marriage, adoption, wills, negotiable instruments, and other acts, which are not included in the discussion here.

*Illustration.* Rhea agreed orally in South Dakota, for a consideration of ten dollars, to convey his land situated in Iowa to Meylink. The statute of frauds in South Dakota

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11 Cheshire 218; Dicey (-Kahn-Freund) 774 rule 152; Graveson 207; Wolff, Priv. Int. Law 446.
12 See, for instance, Paul Voet, De statutis eorumque concursu, Sect. IX Cap. 2 § 9 (to be found in Savigny 488, tr. Guthrie) refuted by Story § 267.
14 Nice peripheral questions arising when parties temporarily dwell in a foreign country have been treated by Raafe 186.
15 This is also the well-known rule of English law, see Dicey 778, Cheshire 565.
"struck," as the Iowa Court expressed it, at the contract itself and did not admit an exception in case of partial payment. Under the Iowa Statute, only the question whether the contract was provable depended on a written document and the payment of ten dollars made the sales agreement enforceable. The Supreme Court of Iowa applied this, its own, law on the ground that _lex situs_ governed the entire contractual relation. 16

As we are not concerned now with the transfer of real property, we shall set aside this construction and consider the configurations arising if the obligatory contract to sell an immovable is sharply separated and construed on its own merits, as Mr. Justice Holmes once did, 17 and many laws do, following the advanced Roman system.

(i) _Lex causae imperative_. If the court had thus separated the problems of obligation from those of title, it could have nevertheless reached the same result, by application of the Iowa law either as _lex loci solutionis_ or as the law presumably intended by the parties, assuming it to govern the entire contractual relation. 18

(ii) _Lex causae optional_. German courts recognize an agreement orally made in Germany by persons of any nationality, creating the obligation to transfer ownership, for instance, of an Italian immovable, according to Italian law, 19 although the German Civil Code, § 313, requires that an agreement to transfer land be embodied in an instrument drawn up by a court or notary. 20

16 Meylink v. Rhea (1904) 123 Iowa 310, 311, 98 N. W. 779, 780. The case is taken as an illustration only. We shall discuss sales contracts with respect to immovables in a special chapter in Volume III, ch. 38.

17 Polson v. Stewart (1897) 167 Mass. 211, 213, 45 N. E. 737, 738.


Poland: Int. Priv. Law, art. 6 par. 3 (domestic form compulsory for contracts concerning immovables in Poland); in accord Switzerland: see 2 SCHNITZER 590.

19 Written form is sometimes claimed to be required by Italian C. C. art. 1314 (new 1350), also for the obligatory contract; but see Fedozzi 251.

20 RG. (March 3, 1906) 63 RGZ. 18 states the rule. Accordingly, OLG. München
(iii) *Lex loci contractus optional.* Conversely, where two Germans in Austria agreed by simple written contract on the sale of a German immovable, the Austrian law of the place of contracting sufficed to validate the act even before a German court.\(^{21}\) (EG. BGB., art. 11, paragraph 1, sentence 2, *supra* p. 490)

(iv) *Lex loci contractus obligatory.* Under the doctrine as it was formerly settled in England, compliance with the formalities of *lex loci contractus* was necessary, hence all solutions discussed above, except *sub* (iii), would be excluded. The contracts in South Dakota and Germany would be unenforceable. It is very significant that, in the case of an agreement to sell land, an exception was recognized in England. In this case, formal validity was said to be sufficiently supported by the proper law of the contract, which in general, though not necessarily, is the *lex situs.*\(^{22}\)

These few examples demonstrate the great interest parties unaware of foreign law have in the rule and particularly in its optional form.

3. *Lex Causae*

*United States.* Exactly what is the present rule in this country? Story seemed favorable to the imperative *lex loci contractus* with special reference to formalities.\(^{23}\) Wharton stated a practical concurrence of English and American jurists in acknowledging the rule, *locus regit actum,* and only doubted whether the rule was imperative or optional.\(^{24}\) He was followed by Mr. Justice Hunt, speaking for the

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\(^{21}\) KG. (March 19, 1923) 44 ROLG. 152 expressly denying the objection of public policy; RG. (May 16, 1928) 121 RGZ. 154, 157 (Czechoslovakian immovable).

\(^{22}\) Dicey (ed. 5) 644 exception 1 to Rule 159; Cheshire 565.

\(^{23}\) Story § 260 cf. § 242a.

\(^{24}\) 2 Wharton 1436, 1438 §§ 676, 679.
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Supreme Court, who stated that “obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum.*” To some writers reviewing the situation from the angle of European doctrine, the cases appear practically, though not by definition, to agree with the optional rule. This, however, as a description of the existing law, is certainly inaccurate.

With good reason, Lorenzen has always maintained that, as in former times, form, unseparated from substance, is governed by the general law of the contract, which need not by any means be that of the place of contracting. No modern case has been found distinctly applying the law of the place of making solely because *formal* validity was in question.

The decisions mostly involve the statute of frauds, immovables, insurance policies, conditional sales, and negotiable instruments. We shall have to deal with each of these subjects later on.

*Other countries.* The Treaty of Montevideo applies its principle of *lex loci solutionis* also to the problems of formal validity, with the exception only that “the forms of public instruments are governed by the law of the place in which they are executed.” This exception has been criticized as inconsistent with the principle and in the revision has been reduced to the execution of the public forms prescribed by the applicable law. That obligations referring to immovables, though independent contracts, as remarked before,

26 BATIFFOL 372 § 435; NUSBAUM, 51 Yale L. J. (1912) 893, 906ff. and Principles 148 § 15; HINRICHSEN, Die *lex loci contractus* im amerikanischen Internationalprivatrecht (Heidelberg 1933) 6.
28 On the Statute of Frauds, see infra II 2.
30 2 VICO 288 § 351; VICO, Report on the Revision of the Treaty, República Argentina, Segundo Congreso Sudamericano (1940) 165; SALAZAR id. 207.
are compulsorily subject to the *lex situs*, is provided in the Polish law.\(^{31}\)

4. Exceptional Rules

(a) *National law*. Some codifications, with the earlier prevalence of the local law in mind, have offered as an alternative only that the form agree with the common national law of all parties.\(^{32}\) Diverse codes derive therefrom a triple option: the form may comply with any of three laws, that governing the whole transaction, or that of the place of making, or the national law of all parties,\(^{33}\) and the new Egyptian and Syrian codes offer another additional form, that of the domicil of the parties.\(^{33a}\)

(b) *Cumulated tests*. The Código Bustamante declares that “the law of the place of contracting and that of performance shall be applied simultaneously to the necessity of executing a public indenture or document for the purpose of giving effect to certain agreements and to that of reducing them to writing.” This seems to mean that, instead of favoring the contract by an alternative, the requirements are cumulated.\(^{34}\) This definitely is a cumbersome solution.

(c) *Law of the forum*. Using a method of reserving application of the *lex fori*, described earlier, several Latin-Ameri-

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\(^{31}\) Poland: Int. Priv. Law, art. 6; in accord Swiss writers, see 2 SCHNITZER 590.

\(^{32}\) Belgian Congo: C. C. art. 11 par. 1. 
Greece: Formerly C. C. (1856) art. 7 for Greeks abroad. 
Italy: Formerly Disp. Prel. (1865) art. 9 par. 1, C. Com. art. 58. 

\(^{33}\) Greece: C. C. (1940) art. 11. 
French Morocco: Int. Priv. Law, art. 10 knows even four possibilities for validity, viz., the laws of nationality of the parties, those of France, those of the Protectorate, and the laws and customs of Morocco.

\(^{33a}\) Egypt: C. C. art. 20. 
Syria: C. C. art. 21.

\(^{34}\) Código Bustamante, art. 180. DE BUSTAMANTE, Manual 281 § 114 gives no reason. Probably to the same effect, the new Brazilian Introd. Law (1942) prescribing Brazilian forms, *infra* n. 35, nevertheless requires observation of the law of the place of contracting.
can enactments, headed by the Chilean Code, which followed an Austrian suggestion, impose their internal formalities on contracts "destined to have effect" in the state, a formula which would seem to presuppose a place of performance at the forum, but sometimes appears to require no more than a law suit for enforcement at the forum. This is also provided in Georgia. An illustration has been given by a Chilean writer: a contract of partnership, executed in France by private instrument, is without value in Chile where solemn execution is required.

On the other hand, we may recall those codes that uphold the validity of contracts agreeing with the law of the forum. Sometimes these code provisions have been understood to cover only formal requirements; with this restriction, the rule has been adopted in several Latin American countries.

Brazil: Introd. Law (1942) art. 9 § 1, a most confusing provision, seems to envisage contracts performable in Brazil and to provide that they must follow the formalities compulsorily prescribed in Brazil (forma essencial). See TENORIO, Lei Introd. 337; SERPA LOPES, 2 Lei Introd. 347; probably also ESPINOLA, 2 Lei Introd. 603. But Dr. Frazão orally advises caution, because forma essencial might be reasonably understood as referring to the necessity of a public instrument only and, hence, might be applicable exclusively to contracts for the transfer or constitution of rights in immovables, under C. C. art. 134 II.

Restricted to public documents:
Chile: C. C. art. 18.
Costa Rica: C. C. art. 8 par. 2.
Ecuador: C. C. art. 17.
El Salvador: C. C. art. 16.
Honduras: C. C. art. 16.
Panama: C. C. art. 8.
Uruguay: C. C. art. 6 par. 2.
Venezuela: C. C. art. 11 par. 1.

Perhaps also VALÉRY 1223 § 873 and his Note, Clunet 1922, 990 has been influential on some of these laws.

Colombia: C. C. art. 22 replaces the reference to be found in the Chilean Code to "proofs which shall have effect in Chile," by reserving "matters of national competence"; 2 RESTREPO HERNÁNDEZ 45-47 § 1031 asserts that this reduced role of the lex fori is justified, but is it clear?

G. PALMA ROGERS, 1 Derecho Comercial (1940) 312.
Argentine: C. C. art. 14 (4).

See, e.g., 1 EHRENZWEIG-KRAINZ 110 § 30 in reference to § 35 of the Austrian Allg. BGB.

Costa Rica: C. C. art. 8 par. 1.
The Civil Code of Mexico gives an option between the law of the place of contracting and the national law of the forum to be exercised only when persons domiciled in the forum contract abroad for performance within the forum. This awkward legislation causes many doubts.

(d) Preponderance of lex causae. A few European writers have postulated a general subordination of the local law to the lex causae. French authors, in particular, have been preoccupied by the formalities of marriage, conceiving lex causae and national law as identical, and have requested that solemnities should always be prescribed by the lex causae; the lex loci contractus should intervene only for determining the acts by which or the manner in which a solemnity can be executed. Following this current, the Institute of International Law in 1927 adopted a set of rules by which the law governing the substance of a transaction not only may dispense it from solemnities required by the local law—which does not go beyond the optional meaning of locus regit actum—but also may "expressly," though not by mere construction, impose an "authentic," i.e., public, act not required locally. Of course, the Código Bustamante, art. 180, goes beyond the restriction upon the local law, providing quite generally that both the law of the place of contracting and that of its "execución"—which probably means performance—shall be applied simultaneously to the necessity of properly executing a public indenture or document.

Guatemala: Law on Foreigners of 1936, art. 24 sent. 3; Law on Constitution of Judicial Power of 1936, art. XXIII par. 1.
Nicaragua: C. C. art. VI (14) par. 2.
Panama: C. C. art. 7.

Mexico: C. C. (1928) art. 15.

In particular for the protection of the national law, 1 Frankenstein 522; De Vos, 16 Revue Inst. Belge (1930) 133 at 155 and writers cited therein; De Vos, 2 Problème 689.

2 Arminjon 135 § 59 with references. Contra: especially Lerebours-Pigeonnière 360 § 315 who observes that the parties cannot know which law will govern.

Annuaire 1927 III 185, 317, 335 (art. VI). To a similar effect, Belgian revised draft, art 10, Neumann, IPR. 201.
In the field of obligatory contracts, such theses seldom have been put into actual practice. At most, there are instances like the following. The German Reichsgericht has reasonably argued that parties selecting the applicable law are supposed to leave to this law, which is the *lex causae*, the decision whether it recognizes the maxim, *locus regit actum*. Another case has aroused much attention. Membership in a German private limited company (*Gesellschaft mit beschränkter Haftung*) cannot be transferred except by a public instrument. At a time when this type of corporation had not yet been adopted in Switzerland, a transfer of such a membership was made there by simple written contract, under the general Swiss rule that contracts need no form. A German court invalidated the contract on the ground of German public policy discarding the rule, *locus regit actum*. Others attained the same result by the argument that the Swiss law of the time had no provision at all for this specific type of contract. The local law, thus, would only be applicable, if it recognizes the same kind of contract. This proposition, however, is strikingly inconsistent with the assumption that parties may evade the most solemn formalities of the *lex causae* by using less or no formality under the law of the place where they are. In fact, the decision should have been justified on a third basis. The formal and substantive requirements of transfer of membership do not pertain to the scope of obligatory contracts but are a part of the personal law of the corporation. German law, hence, determined imperatively the formal conditions of a change in the membership; and contrary to the Reichsgericht, it should not make any difference what formality is prescribed by the present Swiss

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44 RG. (Feb. 27, 1913) Warn.Rspr. 1913, No. 302.
46 RG. (March 22, 1939) 160 RGZ. 225, 228, evidently following the views of FRANKENSTEIN 201 n. 156; LEWALD 69 No. 91.
law in the case of Swiss private limited companies.

II. Scope of the Rules

1. Concept of Formal Requirements

There is practically no doubt that the concept of form includes the problems whether oral conclusion suffices or there is required written documentation, use of certain words, signature with one’s own hand, seal; co-operation of a public official, such as authentication of signatures and minutes of declarations of consent, taking oaths, or entry in a public register; presence of witnesses; service of declaration by registered mail, or by a sheriff or marshal, et cetera. On the other hand, it is also certain that formality has nothing to do with capacity to contract; with agency; with the questions whether an obligation is created by a unilateral declaration, and whether declarations must reach the addressee in order to be effective; with the rules of evidence; and with the consent of third parties, called in certain countries ‘forme habituante.’ It is obvious that formal in contrast with substantive requirements are concerned with the exterior of contractual declarations, the means of expressing consent.

However, the border lines between form and substance are not free from uncertainty in all laws, and this gives the dominant theory one more opportunity to entrust to the domestic law of the forum the power to decide what should be form in the meaning of the conflicts rule. The opposite

47 It is true, there is a theory of a few French writers that such a provision as that requiring promises of gift to be in writing (French C. C. art. 931; German BGB. § 518 and many other codes) involves the capacity of the donor rather than form and hence are subject to his national law. See 2 Laurent 433ff. §§ 240ff., 6 id. 693 § 417; Léon Duguit, Des conficts de législatives relatifs à la forme des actes civils (Paris 1882) 113 (unavailable); Poulet § 289; Rolin, Annuaire 1925, 228; Niboyet 660-661 § 537. This has been generally recognized as an error. See e.g., Pillet, 2 Traité 459 § 623; Weiss, 3 Traité 111; Kosters 190; Arminjon, 2 Précis § 59.

48 Niemeyer, Dus IPR. 111; Lewald 65; Melchior 143 § 98; Nussbaum, IPR. 89; Raape 174 and IPR. 215 (with uncertain restrictions).
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theory of characterization, according to the law referred to, results in applying the municipal provisions of the law at the place of making to those problems which are considered problems of form at this place. In the writer’s opinion, the precise domain of form must be defined, for the purpose of conflicts law, according to the common denominator of what is regarded as form in the various municipal systems: Form is the external side of the making of the contract, the expression as opposed to the content of legal declarations. A separate rule for “form” as contrasted with “substance” of the contract is only justified, if at all, by the relatively minor importance of the manners of expression. If the Dutch Code provides—to use the most celebrated example, although it deals with wills and not with contracts—that a Dutchman should not make a testament in a foreign country by private document, this regards form. To characterize this provision as one restricting capacity to make a will, as many French writers have done, is a plain artifice, which no Dutch lawyer employs. In reality, the Dutch conflicts rule permitting local foreign forms is discarded in this case. Other countries may or may not give effect to this prohibition by adjusting their conflicts rules, as a matter of international policy. But it is difficult to see why they should yield to this exorbitant Dutch pretension. All countries have a stake in the security of transactions, not to be disturbed by willful national claims. Still less, are singular national “characterizations” entitled to extraterritorial recognition. It is a perfect parallel to the controversial character of compulsory religious marriage.

Hence, if the law of the place of contracting, that governing the contract, or that of the forum should have developed some extraordinary method of tracing the border line between form and capacity or other substantive incidents, this is im-

49 M. Wolff, IPR. 128.
50 See Melchior 143 § 98.
material for the scope of the conflicts rule relating to form.

2. Form and Procedure\(^{52}\)

(a) Statute of Frauds. The variants in which the old Statute of Frauds (1677)\(^{53}\) reappears in British and American statutes,\(^{54}\) all contain formal requirements, if judged according to the normal conceptions of a modern lawyer, and therefore have to be taken as subject to the conflicts rules concerning form. It does not matter how a statute of frauds is treated for particular purposes of municipal law in the positive practice of courts. This, indeed, agrees with the conclusion of recent English and American writers,\(^{55}\) strengthened by the French parallels to be discussed hereafter, as well as with the prevailing attitude of American cases.\(^{56}\) In this country, \textit{Leroux v. Brown}\(^{57}\) and the American cases following this ill-famed precedent or other mistaken theories\(^{58}\) should no longer continue to be held as authority.\(^{59}\) The arguments

\(^{52}\) It is not intended to deal here with those contracts made for procedural purposes previous to or during a lawsuit, such as submission to arbitration or to a state court, confession, release, waiver of remedies. They involve particular conflicts problems not thoroughly investigated thus far.

\(^{53}\) 29 Car. 2, c. 3, s. 4.


\(^{55}\) \textit{Beckett, Cheshire, Lorenzen, Cheatham, Beale, Goodrich cited Vol. I (ed. 2, 1958) p. 55}. This was also \textit{Story's} well-known position (ed. 1, 1834) § 262, and that of 2 \textit{Wharton} § 690 and \textit{Thayer, Preliminary Treatise on Evidence 390f}.


\(^{57}\) (1852) 12 C. B. 801.


\(^{59}\) Because of uncertain arguments in a few cases, noted in 3 Wash. and Lee L. Rev. (1941) 103; 14 Miss. L. J. (1942) 256; 6 Md. L. Rev. (1942) 262, some annotators have assumed a continued grave division of opinion.
underlying the better modern approach have been vigorously expounded in Lorenzen's excellent papers" and more recently summarized by the Delaware Superior Court: It assures more security for the inhabitants of a state to know that all contracts made in such state either must be written or may be oral, respectively; (2) while England has one statute of frauds, there are as many as there are jurisdictions in this country; and (3) the fate of a contract ought not to depend on selecting a court before which to bring the suit. As the significance of this classification has been treated on an earlier occasion, it remains only to illustrate the practical effects by a few cases.

(i) Goods of more than £10 value were sold in England without a memorandum in writing. Although English courts may have regarded the unenforceability of an action on the contract as lack of a remedy, foreign courts had to apply section 4 of the English Sale of Goods Act as a part of English law, deemed to govern the form.

(ii) An oral agreement was entered into in Tennessee, to sell a quantity of cheese free on board cars in Wisconsin. The amount involved exceeded the permitted scope of an executory oral contract under Wisconsin law. The Wisconsin court held the contract governed by the law of Tennessee because it was so intended by the parties, and therefore valid.

(iii) Even though the forum were to characterize its own statute of frauds as "procedural," it will confine this characterization to the purposes of domestic private and procedural law. It will not apply this statute to contracts the form of which is regarded as governed by foreign law.

That courts in this field would tend to uphold the contract

60 Lorenzen, supra n. 58.
61 Lams et ux. v. Smith Co. (1935) 36 Del. 477, 178 Atl. 651; the importance of this decision has been noted 105 A. L. R. (1936) 646; Clunet 1937, 873 with Note by Barbey; Barbey, Le Conflit 94, 97.
63 Lorenzen, 32 Yale L. J. (1923) 311 at 315.
64 D. Canale & Co. v. Pauly & Pauly Cheese Co. (1914) 155 Wis. 541, 145 N. W. 372.
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by the means of choice of law cannot fairly be stated. Most cases have been of such nature as to justify in the opinion of the courts the application of the law of the place of contracting, often identical with the law of the forum. 65 Other decisions favor the law of the place of performance over the lex loci contractus for various reasons. 66

(b) Exclusion of nonwritten evidence. The French Civil Code (art. 1341) provides that any transaction exceeding the value of (originally) one hundred fifty francs must be executed before a notary or by private writing, and that no proof by witnesses is accepted. This provision has been widely imitated, with many variants in civil and commercial laws. Testimony may be entirely excluded, as under the former Russian law; or some mention of the agreement in a letter suffices as a "commencement" of proof which may be completed by testimony; or the agreement is enforceable, if the other party admits its making. Also in France witnesses may be admitted to testify to a commercial agreement in the discretion of the court. 67

In the French tradition, stemming from the fourteenth century, all these provisions belong to the group of decisoria litis, contrasted with ordinatoria: they are not merely destined to regulate the course of proceeding but also to decide the substance of the suit. In this conception repeatedly pronounced by the French Supreme Court and shared by the


66 Resulting in unenforceability: Dacosta and Davis v. Davis and Hatch (1854) 24 N. J. Law (4 Zab.) 319; Cochran v. Ward (1892) 29 N. E. 795; Osborne v. Dannatt (1914) 167 Iowa 615, 149 N. W. 913 (Nebraska law).

67 See for a list PARMELE, supra n. 54, 105 A. L. R. (1936) 675-677.

Garnes v. Frazier & Foster (Ky. 1909) 118 S. W. 998 rejects the action on the basis of the law of the forum which was also that of the place of performance as against the lex loci contractus of West Virginia. The court seems to construe the defense as a remedy depriving the plaintiff of a cause of action.

87 See the survey in RABEL, I Recht des Warenkaufs 108-110.
overwhelming majority of the Latin countries, legal pre­
sumptions, judicial confession, and certain kinds of party
oaths terminating litigation, also are substantive matters and
governed by the *lex causae*, at least to the extent that none
of these procedural means is admissible unless it is permitted
by the law governing the substance.\(^68\)

This theory of “preconstituted proofs” certainly extends
the domain of substantive law further and restricts that of
procedure more than the common law or the laws of Northern
and Central Europe can concede. A French writer, on the
background of comparative research, suggests in fact the
elimination of such institutions as confession and oath from
the doctrine.\(^69\)

But, notwithstanding some doubts in past times\(^70\) and
isolated opposition by modern writers,\(^71\) the rules restricting
testimony by witnesses in favor of written documentation
generally enjoy classification as pertaining to formalities in
the meaning of conflicts law.\(^72\) This is a very interesting fact.
It is quite true that the idea of legislators drafting such

\(^{68}\) Cass. (civ.) (February 23, 1864) D. 1864.1.166, S. 1864.1.385; and many other
decisions, particularly Cass. (civ.) (June 14, 1899) Abdy v. Abdy, S. 1900.1.225,
Clunet 1899, 804 followed in the same cause by Cass. (civ.) (Feb. 6, 1905) D.
Survile 667 n. 3; Niboyet 678 § 557; Lerbours-Pigeonnière 341 § 318;
Batiffol 376 § 442. And see for the application of the Ordonnance de Moulins,
1566, art. 54, precursor of C. C. art. 1341, Danty, Traité de la preuve par témoins
(ed. 6, 1769) 49 No. 11.

\(^{69}\) Batiffol 377 § 444.

\(^{70}\) Obertribunal Stuttgart (Sept. 25, 1858) 13 Seuff. Arch. No. 182, cited by
Lorenzen, 32 Yale L. J. (1923) at 319 n. 31 and 334 n. 81 is not representative of
the German doctrine.

\(^{71}\) Frankenstein 364-370 and in JW. 1929, 3506; Raape 175, later abandoned,
IPR. 219. However, the West German Supreme Court has recently endorsed this

\(^{72}\) See the long list of writers, collected by Lorenzen, 32 Yale L. J. (1923)
at 329 n. 66.

Germany: 2 Bar 377 § 395; KG. (Oct. 25, 1927) JW. 1929, 448, IPRspr. 1929
No. 7 (oral agreement in Russia exceeding value of 500 gold rubles; Soviet Code of
Civil Procedure applied); Rabel, 5 Z.ausl.PR. (1931) 280 and authors cited;
Nussbaum, IPR. 90; Raape, IPR. 218, 3.

provisions centers in the procedural situation of a suit on
the contract; originally they attempted to obviate perjury
by bribed witnesses. But, as the French Advocate General
in a learned report of 1880 remarked, in the eyes of the
parties making a contract, the problem is whether they must
reduce it to writing.\(^{73}\) This, however, is enough of a form
problem for the purpose of conflicts law, despite the fact
that admission of a witness is certainly a judicial act.

Lorenzen has correctly co-ordinated this indirect com-
pulsion to writing with the statutes of frauds, both to
be treated under the conflicts rule concerning formalities.
Johnson, too, writing in Quebec, has seen the analogy of
the two institutions (which in reality rests upon a close
historical connection), and, after hesitating between Leroux
v. Brown and the French doctrine, wisely preferred the
latter.\(^{74}\)

(c) Parol evidence. In England and the United States,
the rules excluding parol evidence controverting the text
of written contracts have sometimes been construed as re-
medial,\(^{75}\) but the great weight of authority classifies them as
substantive for the purpose of conflicts law.\(^{76}\) This sound
view agrees with the Continental theory.\(^{77}\)

3. Form and Revenue Law

A vivid discussion went on for a time between followers

\(^{73}\) Proc. Gen. Desjardin in the case Benton v. Horeau, Cass. (civ.) (August 24,
1880) D. 1880 I. 447, Clunet 1880, 480.

\(^{74}\) 3 Johnson 704-724. Historical analysis, as I may add, joins the English and
French legislation in an unsuspected relationship. The Statute, in fact, was inspired
by the French Ordonnance de Moulins of A. D. 1566, art. 54, predecessor of arts.
1341ff., C. C., and both to a large extent had the very purpose of prescribing formal-
ities. See Rable, "The Statute of Frauds and Comparative Legal History," 63 Law

\(^{75}\) Downer v. Chesebrough (1869) 36 Conn. 39, 4 Am. Rep. 29.

\(^{76}\) Dunn v. Welsh (1879) 62 Ga. 241; Baxter Nat'l Bank v. Peter S. J. Talbot
(1891) 154 Mass. 213, 28 N. E. 163; Restatement § 599; Thayer, Preliminary
Treatise on Evidence (1898) 390; Wigmore, 5 Evidence (ed. 2, 1923) § 2400;
Goodrich 249 § 89; Stumberg 143.

\(^{77}\) See French C. C. art. 1341 and its literature cited above.
of the idea that the revenue laws of a foreign state are not to be enforced, and the advocates of *locus regit actum*. The former denied, the latter recommended the rejection of contracts that are declared void for want of a stamp at the place of making. Older English decisions have recognized the invalidity imposed by the law of the place of contracting. But in the field of bills of exchange where the question is more important, the British Bills of Exchange Act of 1882 departed from this view, and the Geneva Convention of 1930 concerning stamp laws, adopted by many countries, pronounced that the validity or the exercise of the rights flowing from such instrument shall not be subordinated to the observance of the provisions concerning the stamp.

It seems high time to generalize this sound principle, in agreement with the American cases. Since one of the two conflicting views must yield, it stands to reason that laws clinging to fiscal sanctions against the security of contracts should be internationally ignored.

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81 Alves v. Hodgson (1797) 7 T. R. 241 at 243 by Kenyon, C. J. "Then it is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good there it is not obligatory in a court of law here." Clegg v. Levy (1812) 3 Camp. 166; Bristow v. Sequeville (1850) 5 Ex. D. 275; República de Guatemala v. Nuñez [1927] 1 K. B. 669. In case the foreign law declares only that an unstamped contract is inadmissible as proof, the English courts applied their procedural theory of disregarding the foreign rule of evidence, James v. Catherwood (1823) 3 D. & R. 190; *In re* Visser, H. M. The Queen of Holland v. Drukker [1928] Ch. 877. See *Dicey* 848 note 28; *Cheshire* 219.

82 45 & 46 Vict., British Bills of Exchange Act, 1882, c. 61, s. 72 (1) (a).

Canada: An Act relating to Bills of Exchange, Cheques and Promissory Notes, Rev. Stat. 1927, c. 16 s. 160 (a).

4. Determinations of the Place of Contracting

The question where to locate the place of contracting again arises, with all its grave difficulties.

(a) Contract by correspondence. On the ground of the usual characterization “according to the lex fori,” a contract is considered made at the place where the final act necessary under the law of the forum for completing the consent is done.\(^{84}\) We have discussed this approach before.\(^{85}\) It may suffice to remember that under this method a German court should ascertain a place of contracting in the United States by consulting the German Civil Code. By another approach, out of sheer dogmatism, cumulative application of the consent requirements in both domiciliary laws has been advocated.\(^{86}\) Continued discussion of the problem has fostered more proposals and a more complex situation.\(^{87}\) A unilateral act, however, such as giving notice to a debtor or making a binding offer, though usually becoming legally significant only upon its reception, is generally held in conflicts law to have occurred at the place where it is sent.\(^{88}\)

This confusion is incurable. The maxim, *locus regit actum*, was not invented for contracts or acts by correspondence, any

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\(^{84}\) United States: Stevenson v. Lima Locomotive Works (Tenn. 1943) 172 S. W. (2d) 812; 2 Beale 1069ff. §§ 325.1, 326.1.

Germany: RG. (Feb. 12, 1906) 62 RGZ. 379, 381 (where the acceptance is declared in the case of § 151 BGB., cf. Lewald 70ff.); RG. (Jan. 29, 1901) 12 Z.int.R. 113 (where the formal act is completed); Geiler in I Düringer-Hachenburg 55 n. 20.

\(^{85}\) *Contra*: Raape 178; supra Chapter 30 pp. 455ff.; in this special field the theory of Bartin was theoretically attacked by Marcel Vauthier, Sens et applications de la règle *locus regit actum* (Bruxelles 1926) 101ff.

\(^{86}\) 1 Bar 361; Niedner, EG. BGB. art. 11; 2 Zitelmann 164; Raape, IPR (ed. 1) 130 abandoned in ed. 4, 214; also OLG. Celle (Nov. 7, 1879) 33 Seuff. Arch. No. 89; apparently also Czechoslovakian Law of 1948 on private international law, § 8. *Contra*: Neumeyer, 22 Z.int.R. (1912) 519.

\(^{87}\) See the hard task faced by Raape 178-181.

Zweigert makes the noteworthy suggestion, “Zum Abschlussort schuldrechtlicher Distanzverträge,” I Festschrift Rabel (1954) 631-654, that the offeror may comply with the form of the place where he sends the offer, and the offeree with the form of the place where he sends the acceptance; followed by Raape IPR. 214.

\(^{88}\) Habicht 89; Walker 229; Neumeyer, IPR. 14; Frankensteiin 545; Raape 177 and IPR. 213.
more than was the *lex loci contractus*. If it is to be practicable in our time, it ought to be appropriately modified.

(b) *Determination by the parties.* If the parties agree that their contract should be deemed to be made at a certain place, while they make the contract at another place, the local law of the place indicated is not able to prevail over both the law of the real place of contracting and that governing the contract. But it may, and generally will, be itself the *lex causae*, by virtue of the party agreement. This is a controversial consideration, however, with respect to signatures on negotiable instruments, if they need the indication of a place of issuance and name an agreed location.\(^9\)

### III. Operation of the Rules

1. Solemnities Prescribed by *Lex Causae*

Even though a court may follow exclusively the formal requirements of the law governing the entire contract—as American courts do—it has to account for local differences in particulars. Therefore the following rule of the Restatement is true beyond its intended scope:

> "§ 335. The law of the place of contracting determines whether an instrument alleged to be a contract under seal is effectively sealed; whether it is duly executed and delivered. . . ."

This rule is meant pleonastically to explain the principle that formal validity is altogether determined by the law of the place of contracting. However, it must apply also to some effect when, contrary to the Restatement, another law governs validity and requires an instrument under seal.

On the other hand, contracts governed by the law of the forum and thereby needing some publicity, may be executed

outside the state in an analogous but not identical manner. This, in fact, seems to be the meaning of the elaborate provisions commonly found in American statutes, declaring what officers may take acknowledgments outside the state in the United States and without the United States.\(^\text{90}\) New York has a long list of such foreign officers, qualified according to different countries.\(^\text{91}\) Only in Ohio is it expressed that “any instrument in conformity with the law of the foreign country is valid,”\(^\text{92}\) but if Oregon declares it unnecessary for the instrument to state that “it is executed according to the laws of the country where made,”\(^\text{93}\) the idea evidently is prevalent that a deed acknowledged before a consul of the United States, a French notary, or a German court is sufficient at the forum, if the officer conforms to his own law. The main importance of these provisions concerns their application to deeds disposing of real estate in the state, but is not confined to them.

The same is true in civil law countries, at least to the extent that, if in one country notarial form is prescribed, a notarial document of another is satisfactory despite differences of officers, recitals, witnesses, signatures, and recording.\(^\text{94}\) Even under a conflicts rule such as that of Venezuela requiring public instruments or private documentation according to its own Civil Code,\(^\text{95}\) it may be presumed that these writings can be drawn up according to the local style. The new text of the Montevideo Treaty expressly provides that the formalities pertaining to the class or “quality” of instru-

\(^{90}\) See CARL LOUIS MEIER, Anderson’s Manual for Notaries Public (Cincinnati 1940) §§ 162ff.
\(^{91}\) New York: Book 49, Real Property Law (McKinney 1936) § 301, Book 49, Real Property Law (McKinney 1944) §§ 301, 301a.
\(^{92}\) Ohio: Rev. Code Ann. (1953) § 3301.06.
\(^{94}\) Universal doctrine, evidently meant to be expressed in the Brazilian Introductory Law (1942) art. 9 § 1. See, e.g., 2 Bar 379 § 397; NIBOYET 66o §§ 535, 536; HABICHT 87.
\(^{95}\) Venezuela: C. C. (1942) art. 11 par. 2.
See other references supra n. 35.
ments required by the governing law (which is always the *lex loci solutionis*) is determined by the law of the place of contracting (art. 36).

Very cautious provisions looking in the same direction are contained in the Protocol on Uniformity of Powers of Attorney, sponsored by the Pan-American Union, of which the United States is a member. 96

It is regrettable that numerous European writers have confused these obvious rules by talking of the “imperative character” of *locus regit actum*, because a notary has necessarily to follow the procedure prescribed by his own law. 97 In reality, the principal function of *locus regit actum* is not even in question, but, on the one hand, internal rules are construed so as to permit authentication by foreign officials, 98 and, on the other hand, the foreign official obeys the regulations of his own state by virtue of administrative rather than conflicts law. 99

An important doubt has been raised, however, concerning the equivalence of the institutions for securing evidence. In France, from Roman times, and in many other countries by old, if less venerable, tradition, notaries form a veritable profession of accepted standing with proper education, organization, and discipline. Their intervention in the drawing of minutes and records implies a certain investigation into the physical and mental state of the parties appearing and affords certain guarantees beyond the identification of persons. The question is whether notaries public or other officers in the Anglo-American countries, in Denmark, Sweden, and others, can replace a French notary or a German notary or


97 2 LAINE 409 § 226; DESPAGNET 663ff. § 217; Institute of International Law, Draft 1927, Annuaire 1927 III 335 art. 4.

98 NEUMEYER, Annuaire 1927 III 169, 171; NUSBAUM, D. IPR. 94; BARMAT, supra n. 1, 358.

99 NEUMEYER, Annuaire 1927 III 170; BARMAT, supra n. 1, 133, 359.
court not only in authenticating signatures, which is unchallenged, but also in establishing a French "acte authentique" or a German "öffentliche Beurkundung eines Rechtsge­schäfts."\textsuperscript{100}

In the United States, acknowledgments may be taken in all jurisdictions, before notaries or similar officers, in procedures analogous to the two elements of a European notarial document, viz., the certification by the public officer entitled to full faith, and the party's declaration, the object of the certification, which may be refuted by ordinary evidence.\textsuperscript{101} The party may produce an instrument and acknowledge having signed it; by the reference in the certification and inclusion in the official record, the requirements for German notarial minutes, for instance, are literally fulfilled.\textsuperscript{102} Of course, proceedings and background for such authentications vary. Also, a contract under seal is generally perfected by delivery of the instrument, whereas a civil law contract requires acceptance of the promise. Nevertheless, the European courts have generally not hesitated to accept American certifications, even in matters not permitting the use of a foreign local form, such as articles of association for a German limited partnership or a conveyance of real estate.

A special situation exists in New York. An opinion of a New York Attorney General has encouraged the notaries to adjust their declarations and attestations completely to the requirements for proper recordation in any foreign state.\textsuperscript{103} The notary does not assume responsibility for the validity of his act, nor would the county clerk attest to more than the genuineness of the notary's signature and his qualification to act as notary in the state. Nevertheless, the act may come

\textsuperscript{100} The problem has been noted with the request of inquiry by \textsc{I. Frankenstein} 536; \textsc{Raape} 165; \textsc{M. Wolff}, IPR. 128. Cf. Clunet 1910, 478.

\textsuperscript{101} \textsc{Glasson} et \textsc{Tissier}, 2 Traité de procédure civile (ed. 3, 1926) 679 § 603; \textsc{Dalloz}, 9 Répert. Pratique 392ff. §§ 140ff.

\textsuperscript{102} Germany: Law on Voluntary Jurisdiction § 176.

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fairly close to foreign models. It is surprising, though, and may stir doubts abroad, that the legal basis of this practice, notable in itself, should be found in a clause of the New York notary law dealing only with bills of exchange and promissory notes.\(^\text{104}\) It may be timely to suggest that these provisions be expressed in a separate clause when a future law is drafted.

2. Form Agreeable to \textit{Lex Loci Contractus}

The proper meaning of the rule, \textit{locus regit actum}, goes farther than the mere substitution of a foreign solemnity for the domestic formality. Limitations upon such replacement often have been attempted, but provoked such unanswerable questions as whether an English will of a Frenchman attested by two witnesses, or a holographic will of a Frenchman made in Louisiana in the presence of his wife, may be recognized in France as an \textit{"acte authentique"},\(^\text{105}\) or, after all, what \textit{"acte"} is \textit{"authentique"} and what is not.\(^\text{106}\) As the rule has come to be interpreted, in the common opinion, no other solemnity is needed than that required at the \textit{locus}, and none, if the transaction takes place in a jurisdiction where no formality is necessary.

Thus, under the Civil Code of Quebec, a promise to make a gift needs notarial form, and the original is to be kept of

\(^{104}\) Executive Law, Consolidated Laws of New York 1909, Vol. 2, c. 18 § 105 (1) (Book 18, Executive Law, McKinney 1916): "A notary public has authority: 1. Anywhere within the state to demand acceptance and payment of foreign and inland bills of exchange and of promissory notes, and may protest for the non-acceptance or non-payment thereof, to exercise such powers and duties as by the law of nations and according to commercial usage, or by the laws of any other government, state or country, may be performed by notaries." Only the following subsection (2), Consolidated Laws of New York 1909, Vol. 2, c. 18 § 105 (2) (Book 18, Executive Law, McKinney 1916) and Laws 1943, c. 333, concerns the power to take affidavits and to certify the acknowledgment and proof of deeds and other written instruments.

\(^{105}\) Long ago the courts answered wisely in the affirmative; Cass. (civ.) (Feb. 6, 1843) S. 1843 i.209; Cass. (req.) (July 3, 1854) S. 1854-1.417.

\(^{106}\) On this dispute, especially among Dutch authors, see BARMAT, \textit{supra} n. 1, 352ff.
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record; but the same section of the Code expressly recognizes execution validly made outside the province without notarial form.\textsuperscript{107}

Public policy. But does public policy of the law governing the contract not react unfavorably, especially if it happens also to be the law of the forum? Can a law requiring certain acts to be clothed in writing and especially ordaining recording by public instrument, in order to secure serious deliberation before the deal and reliable evidence after it, simply be avoided by the parties going abroad? The objection has been voiced in various ways by Paul Voet and later authors, refuted by Waechter and Savigny, and repeated again by modern writers up to Niboyet and Frankenstein.\textsuperscript{108} Several Latin-American codes, mentioned earlier, have been inspired by similar ideas.\textsuperscript{109} To this, the reply has always been that opportunities to obtain consular authentication, though useful, are insufficient, that the old customary rule precisely intends to give the parties the right to conclude their transaction under any sovereign, and that the privilege given to the parties serves international business and security. It may be admitted that the doubt has some foundation in such vital matters as recognition of children and perhaps also marriage contracts. But the tutorial concern of legislation for persons engaging in a surety agreement, a promise to make a gift

\textsuperscript{107} Quebec: C. C. art. 776. Even a petitory action was maintained on a deed of sale of Quebec land made under private signature in Chicago, Brousseau v. Bergevin (1905) 27 Que. S. C. 510; 3 Johnson 332.

\textsuperscript{108} See P. Voet, \textit{op. cit. supra} n. 12; Foelix (ed. 1, 1843) 96 § 58, (ed. 3) § 82, I and IV with citations; 2 Laurent §§ 240 ff., 6 id. §§ 417ff.; Neubecker 79; Niboyet 661 § 537; 1 Frankenstein 520ff.; Economopoulos in 2 Acta, International Academy of Comparative Law (1935) Part 2, 522.

\textsuperscript{109} Supra n. 35; see for instance, Bevilacqua 259ff. commenting on Brazilian law. The dominant liberal rule, however, is adopted, for instance, in Argentina, see S. Ct., 21 Fallos 251, 23 id. 526; 32 id. 118.

\textsuperscript{110} Waechter, 25 Arch. Civ. Prax. (1842) 413; Savigny § 381, Guthrie in his translation 324 note (n) discussing English law; 2 Wharton 1463 § 695; 1 Bar 350; Surville 301 Nos. 190ff.; Walker 224; 2 Arminjon 134 § 39; Fedozzi 250. For wills in particular, see Weiss, 4 Traité 647ff.; Fedozzi 253.
or an obligation to convey land must not extend over the entire world. Even though parties could temporarily go abroad for the sole purpose of obtaining an easier mode of contracting, the establishment of an exception for the repression of such evasion would open the door to inquisitions harmful to the great task of "locus regit actum."

The French Court of Cassation, indeed, although always particularly wary of the observance of French law by French nationals, has not hesitated to recognize in two leading cases a marriage contract made in Constantinople and a donation made in Canada, both formally valid according to the respective local laws but not in compliance with the French Code; ordinary obligatory contracts are included by an obvious argumentum a fortiori.

Also in the United States, although a few courts have not been certain how to treat their domestic statutes of frauds, if such a court should decide to construe its statute as non-procedural, it would hesitate to enforce it as an expression of public policy.

3. Renvoi

As usual, renvoi may serve to relax a too rigid conflicts rule. Argentina decrees an imperative lex loci contractus for formal validity. Whether renvoi is admitted in Argentina,

111 Recently, 2 Arminjon 161 ff § 68; Raafe 189, but now IPR. 212. The contrary dominant opinion is approved in Norwegian law by Gjelsvik, Das internationale Privatrecht in Norwegen (Leipzig 1935) 125.
112 Cass. (req.) (April 18, 1865) S. 1865.1.317; Cass. (civ.) (June 29, 1922) D. 1921.1.127, S. 1923.1.249; Niboyet 67bf. § 557; Lerebours-Pigeonnière 339 § 315; 2 Arminjon 134ff. § 59.
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is an unsettled question, but it has been hypothetically re­
sorted to in several cases. In fact, if we suppose a contract
made in Quebec, void there under the domestic law but
valid under the law of New York where it is to be per­
formed, and the parties have stipulated for New York law,
a Quebec court would have to apply the *lex causae* under
the optional rule *locus regit actum*. An Argentine court
ought to decide in the same way by use of transmittance. But
any American court should judge likewise, independently
of its theories of either formal validity or renvoi. In the
case where the two foreign laws involved agree in the result,
foes of renvoi have perforce conceded its necessity.

4. Defective Form

Where parties have failed to comply exactly with both
the forms of the *lex causae* and the *lex loci actus*, the effects
of nonobservance may be very different in the two laws.
Accordingly, in the traditional meaning of *locus regit actum*,
a party may avail himself of that law which more nearly
approaches giving effect to the act. An adverse opinion,
however, mentioned earlier in connection with formally de­
fective marriages, urges the supremacy of the *lex causae*.

An agreement to sell land, for instance, violating the
statute of frauds of both states, may be considered void in
one and merely unenforceable in the other; or void under
the *lex loci contractus* because of violation of the statute of
frauds and under the *lex situs* merely lacking proper evidence
and curable by various events; or void at both places but
creating an obligation to pay damages for reliance in one
jurisdiction. Only the dominant theory is logical and prac-

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114 2 Vico 285. The problem discussed in the text has been recognized by Gjelsvik,
*supra* n. 111, at 127 and has been treated more often with respect to the form of wills.
116 Niemeyer, Das. IPR. des BGB. 114; Raape 186, 255 and IPR. 211 No. 4;
tical. Why should, for instance, curing of a formal defect under the law of the place of contracting not have its full effect? If the theory of *locus regit actum* is sound in itself, its stature should not be reduced by half.

On the other hand, the dominant opinion may run into some practical difficulties in particular cases, which, however, thus far have not been experienced or discussed.

IV. Conclusion

Of all the ordinary and exceptional rules stated above, only two are susceptible of serious competition: The American application of the *lex causae* and the optional rule, *locus regit actum*, prevailing in the rest of the world. The compulsory rule in England is antiquated,\(^{117}\) and the nationalistic Latin-American experiments deserve sharp rejection. The proposals of the Institute of International Law have attempted a compromise between governing law and local law, envisaging national prerogatives over family and inheritance law rather than the needs occurring in contracts.

The rule, *locus regit actum*, shares the fate of many older principles; it has been widely accepted but justified by conflicting theories. Sovereignty, international law, regionality of public policy, customary law, voluntary submission of the parties, vested rights, convenience of the parties, expediency for international business — each one singly and all these motives in co-operation — have been advanced as the true basis of the rules. The draftsmen of the German codification considered only reasons of practical convenience,\(^{118}\) and at present this is the dominant conception. The attribution of exclusive force to the *lex causae* is opposed as a source of iniquity.


\(^{118}\) 2 ZITELMANN 143ff.; 6 Protokolle Zweiter Lesung des Entwurfs des BGB. 32-37; MELCHIOR § 155; GEILER in 1 Dürringer-Hachenburg 56 n. 21.
In fact, the American courts have in many cases escaped untenable results by shutting their eyes to the consequences their rulings would have on questions other than those of form. A court may be satisfied with the justice of treating an oral contract under the law of the place where it is made. But, if it operates in conjunction with a general rule that validity, or validity and effect, is governed by lex loci contractus, this law would have to apply also to the necessity of consideration, the capacity of a married woman to contract, the influence of misrepresentation made by an agent, the validity of a clause exempting a party from liability, and so forth. Such incidents, in their turn, have been judged in individual cases by other criteria. The Supreme Court in Pritchard v. Norton (supra p. 364) took the question of consideration away from the law of New York, the place of contracting, to Louisiana, the place of performance. Certainly, it is by no means desirable to divide the contract into fragments, instead of subjecting it to the one law of characteristic significance. But formal validity, if guaranteed by the law of the place of making as an added opportunity to grant validity under the over-all law, leaves the latter intact and satisfies practical needs. With respect to wills, the Uniform Wills Act, Foreign Executed, adopted by thirteen states, has created a special rule for formalities and permits a will to be executed in the mode prescribed by the law either of the place where executed or of the testator's domicil. Cases concerning bills and notes before the Negotiable Instruments Act could best be harmonized by a permissive locus regit actum, as suggested by Lorenzen, who has

118a Now replaced by the Model Execution of Wills Act (1940) s. 7, adopted only in Tennessee.
119 See for comment, Walter W. Land, Trusts in the Conflict of Laws (New York 1940) 24, 54 §§ 8, 16 and see his observation, p. 45, regarding tangible property on the alternative reference rule of most statutes.
proposed this rule also for a Pan-American unification of conflicts law. If the rule were adopted by the American courts, an irritating source of disturbance would disappear. The courts would gain more freedom to choose the proper law for the substance of the contract.

We have, however, realized the necessity of developing the rule so as to take care of the really typical modern cases. Whenever the laws of two or more territories are involved in the formation of a contract, to give exclusive preference to one of them is quite as wrong as to cumulate their requirements. Rather, compliance with one of the two local laws should suffice. The problem is different from the inquiries for determining the place of contracting for the purpose of finding the governing law or the law deciding whether or not the contract has been formed. The customary privilege for upholding formal validity is sound; hence it ought to be extended rather than curtailed. Consequently, in the case of contracting by correspondence, the law of the place where the offer is dispatched should suffice for determining validity of the contract, as well as the law of the place whence the acceptance is sent.

An even broader possibility has been suggested by Lainé to the effect that the law of the forum, and any other law indicated by an interest of the parties, also should be able to validate the form of a contract. In this country, the idea of giving the law of the forum a favorable influence on validity was revived by Lorenzen with respect to the statute of frauds at a time when the statute of frauds was widely regarded as procedural. The very success of Lorenzen's construction of the statute of frauds as substantive in conflicts law seems to obviate this emergency solution.

121 LORENZEN, 15 Tul. L. Rev. (1941) at 167.  
121a In this sense Argentina: C. C. art. 1181.  
122 LAINE, Clunet 1908, 674, 681-685, 692-693.  
123 LORENZEN, 32 Yale L. J. (1923) at 333-334.
The law of the forum as such, indeed, should not compete with the others in the field of obligatory contracts, either for the sake of a permissive policy or for that of rejecting foreign transactions.

Domestic policy should not be opposed, in particular, to the free use of foreign instruments, as it is done in numerous Latin-American codes, when the solemnities required at the forum for similar transactions are lacking. Respect for foreign law should also be maintained in carrying into practice the universally recognized rule that solemnities prescribed by the governing law are replaceable by compliance with analogous local formalities. An apparent exception to this minor function of the rule *locus regit actum* exists in the United States to the extent that the statutes indicate what persons are empowered to take acknowledgments outside the state. This is probably intended to be a facilitation rather than an imposition. Usually the enumeration of the designated legal officers is extensive. Nevertheless, it would be preferable to leave their selection to the respective foreign systems and to make it clear that, as a rule, obligatory agreements do not need to comply with the domestic formalities when they are executed abroad.