Chapter 32

Scope of the Law of the Contract

When the law governing a contract, or a group of contracts, has been ascertained, what problems does it cover? In principle, notwithstanding the theories that would split the contract into segments, it should embrace all incidents of the contractual relationship. Special rules regarding form and those concerning the application of a personal law to capacity to contract, have been treated earlier in this work.

This chapter, however, will discuss doubts and objections that have been raised to the rule of a unitary law for the problems arising on a contract. This discussion cannot be exhaustive, since questions of classification originate with the consideration of each special type of contract. Moreover, such topics as acts of parties modifying the obligation or transferring rights or duties, and the whole doctrine respecting limitation of actions and termination of contractual rights, cannot be expounded at this juncture.

While American conflicts literature is accustomed to ask whether lex loci contractus, or lex loci solutionis, or lex fori applies to a problem, we have here to speak in terms of the law of the contract, of a second law applicable to special problems, and of public policy opposing foreign law. This divergency of method causes some difficulties in the effort of comparing the solutions.

1 See particularly the comparative survey as of 1917 by Kosters 773-779.
2 Supra Chapter 31.
I. FORMATION OF THE CONTRACT

I. Consent in Form

The problem. The municipal laws provide diverse solutions for questions such as whether an offer binds the offeror and, if so, for what length of time; whether acceptance must be declared, dispatched, arrive, or be perceived, to conclude the consent, and whether perfection of the contract has retroactive effect. Many particulars, too, vary.  

What law to apply to these questions, is a matter of both practical and theoretical interest.  

Illustrations: (i) Binding force of offer. Lorenzen has presented the following example: A resident of New York having made an ordinary offer, without time limit or other qualification, by letter to a German in Germany, revokes it by cable a few hours after the letter is received. The addressee, knowing that under German law the telegraphic withdrawal is inoperative, at once accepts the offer. Under New York law, the offer is revocable until dispatch of acceptance and the contract fails to come into existence. If, according to Lorenzen's suggestion, the lex fori were to apply, the parties would be held to the contract in any German court but not in any American court.

(ii) Acceptance by silence. A seller in New York offers merchandise to a firm in Liverpool with which he frequently has business relations and which had declared a desire for these particular goods. The addressee does not answer. Courts in the United States, and decidedly many Continental courts, are more inclined than English courts to imply acceptance by silence. In an analogous case, a Swiss seller and a French buyer had negotiated through the seller's agent in Paris; the agent had no authority to conclude the bargain, and

4 For comparative law see RABEL, I Recht des Warenkaufs 69-108; International Institute for the Unification of Private Law, De la formation des contrats entre absents, Étude Prélminaire (mimeographed) S. d. N.—U. D. P. 1935, Étude XVI.

5 EDUARD WAHL, 3 Z.auß.PR. (1929) 775; ACHENBACH, Der briefliche und telegraphische Vertrag im vergleichenden und internationalen Privatrecht (Hamburg 1934); FERID, Zum Abschluss von Auslandsverträgen (Sonderdruck der Studiengesellschaft für privatrechtliche Auslandsinteressen, No. 10, 1954).

6 LORENZEN, 31 Yale L. J. (1921) at 53.
the seller failed to give an express confirmation. The Swiss Federal Tribunal nevertheless held the contract to have been completed under Swiss law as the _lex loci contractus_.

(iii) _Loss of letter of acceptance._ A merchant in Paris by letter to a firm in New York offers to buy certain goods; the letter of acceptance is lost in the mail. The New York seller sues on the basis of a contract perfect under New York law. The French party denies the contract according to French law.

(iv) _Delayed answer._ In a Norwegian case, A in New York, owning land in Norway, by a letter to B in Norway, offered to sell the land but limited the time for acceptance. B answered affirmatively in time, but his letter was delayed in the mail and reached the offeror when the time limit, and let us suppose, a reasonable time for receiving an answer, had expired. A failed to make any reply. The majority of the Supreme Court in Oslo granted B’s action against A, by application of Norwegian law, because A should have notified B of the delay or otherwise should have complied with the contract. The minority dissented on the ground that New York law as the law of A’s domicil applied.

_Conflicts rules._ Many approaches have been tried. Beale, as well as the Swiss Federal Tribunal, according to his usual method, applies the _lex loci contractus_, which, however, in relation to foreign countries leads nowhere. Continental writers have proposed to resort to the national law of the offeror, or the law of his domicil in several variants.

---

7 BG. (Sept. 28, 1912) 38 BGE. II 516, 519.
8 Norwegian S. Ct. (1924) 2 Z.ausl.PR. (1928) 873 No. 51; HAUDEK 67 approves the majority vote and RAAPPE, IPR. 457 No. 3 the dissident vote.
9 2 BEALE 1174-1176; Restatement § 332 (c).
Swiss BG. (June 9, 1906) 32 BGE. II 415; (Sept. 28, 1912) 38 BGE. II 516, 519. The recent decision reversing this rule in favor of the law of the contract left questions on the formation of agreement deliberately open, BG. (Feb. 12, 1952) 78 BGE. II 74, 86.
10 Supra Chapter 30, p. 457.
11 BARTIN, 2 Principes 89.
12 German RG. (Nov. 20, 1902) 53 RGZ. 59 (isolated); NUSSEbaum, D. IPR. 239 FERID (supra n. 5) § 24; BATIFFOL 345 § 393 and n. 2 suggesting that a prolonged sojourn may replace domicil; in Traité 665, for law of the contract.

A similar result is perhaps viewed in Brazil by C. C. art. 1087; the contract is made where the offer has been made, and Introd. Law (1942) art. 9 § 2: where the offeror resides.
SCOPE OF THE LAW OF THE CONTRACT 523

Another doctrine, following the usual way out of embarrass­
ment, cumulates the requirements of both laws involved. 18
But more often the true emergency solution, lex fori, has been suggested. 14

Only the German courts have been in position to face the
problem squarely. 15 They apply the same law that would
govern the contract if it were valid. 16 Where the automatic
force of the law of the place of contracting is eliminated, this
is the natural solution, approved by those modern writers
who are not afraid of an alleged vicious circle, nor of the
existence of a contract which may be denied by the domi­
ciliary law of one party. 17

Illustration: (v) It is litigious whether a contract has been
effectively agreed upon between S, operating a sawmill in
A, State X, and P, a manufacturer of furniture in B, State Y,
to sell four carloads of lumber, deliverable at a certain date
on the side tracks of the railway depot in A. Because of this
determination of the place of delivery, as will be submitted
in the third volume of this work, the law of State X governs
the contract. This includes all questions of consent in form
as well as in fact. There is no inquiry into such questions
as which party has first made an offer or where acceptance
has been signed or mailed or received.

Writers following this theory have been preoccupied, it
is true, with hardships resulting, for instance, if an American
party, contrary to his own law, should be declared bound by

13 LEWALD No. 295; PACCHIONI 329 § 10; for cumulation modified by favor to
validity ACHENBACH, supra n. 5, criticized by WAHL, Book Review, 10 Z.ausl.PR. (1936) 1070.
14 LORENZEN, 31 Yale L. J. (1921) at 53; PILLET, 2 Traité 180-181; DZENA, 2
Princ. 256; HAUDEK 91. Contra: PACCHIONI 328 § 10.
15 Statement by BATIFOL 346 § 394 bis and n. 1.
16 This is the law intended by the parties or the law of the place of performance.
See RG. (Jan. 3, 1911) 55 Gruchot’s Beiträge 888; (May 15, 1917) Warn. Rspr. 1917, 267; (Jan. 16, 1925) 34 Z.int.R. 427; (March 13, 1928) IPRSpr. 1928 No. 1;
(May 12, 1928) Leipz. Z. 1928, 155c; (Feb. 3, 1933) IPRSpr. 1933, 19 No. 10.
The lex loci solutionis has been also advocated in Argentina by ZEBALLOS in 2
Weiss-Zeballos 295 n. (a).
17 WAHL, 3 Z.ausl.PR. (1929) 788-800; RABEL, id. 753.
an offer, as in the above example (i) under German law, or an English party bound by his silence as in the above example (ii). One proposal is that the court of such a party's domicil might free him on the ground of public policy.\textsuperscript{18} This, however, would not help, if the case were to be tried in the other court, and would defy the purpose of the rule. A more attractive suggestion has been to consult the domiciliary law of each party, not for all, but for the single question, whether his conduct presents any declaration that might be a subject matter for legal construction.\textsuperscript{19} The underlying argument of equity, however, is doubtful in view of the interest of the other party, which, supposedly, would be protected by his own law. In addition, English and American courts cannot be expected to follow a personal law.

Indeed, the apparent hardship disappears, if the modern principles of interpretation are duly transferred into the field of international business transactions. A German court under German law cannot treat a proposal to contract as a binding offer, if the offeror must be presumed to have intended the contrary.\textsuperscript{20} An offer by a New York firm, in the absence of particular circumstances, can not be understood as would an offer of a German to another German. Nor should an offer by a New Yorker to a Norwegian, under express limitation of time, be construed as embodying the conception that he must repudiate a belated acceptance. Under any law whatever, informal declarations ought to be construed according to the principles of good faith, considering the laws and usages of the place where the declarant lives. Certainly, if a declaration is sent out into the world, the sender is not entitled to expect that the effect will always be the same as

\textsuperscript{18} \textsc{Batiffol} 346 § 394; \textsc{Raape}, IPR. 456.

\textsuperscript{19} M. \textsc{Wolff}, IPR. 123 and Int. Priv. Law 439; \textsc{Wahl}, 3 Z.ausl.PR. (1929) 800; \textsc{Rabel}, id. 754; K. Th. \textsc{Kipp}, in Fischer-Henle-Titze, Bürgerliches Gesetzbuch (1932) 1109 II 1; \textsc{Raape}, IPR. 455ff.

\textsuperscript{20} See also \textsc{Wahl}, 3 Z.ausl.PR. (1929) 801. For an analogous appraisal of the question whether a proposal is meant as an offer, \textsc{Raape}, IPR. 458 No. 5.
under the law of his domicil. But this does not affect our cases. Wise judges are careful not to subject foreign promises to domestic standards, unless submission to them appears to be required by usage.

2. Consent in Fact

The problem. Error, fraud, duress, and simulation are everywhere grounds for nullity or voidability, yet circumstances vary. Error, in particular, may be either more or less liberally allowed to vitiate the consent. The most important difference of laws resides in the question whether error must be caused by misrepresentations of the other party or at least the latter must have been unaware of the error. In addition, the various shades of invalidity are divergently regulated, and so is the liability of the party avoiding a contract on the ground of his own mistake. The following examples may illustrate the ensuing conflicts problem:

(i) A, a resident of British Columbia, acquired what in his opinion were treasury bonds of a corporation in the state of Washington, but were actually common stock shares, the holder of which was liable under the corporate charter for certain payments.

The Canadian court refused to apply the law of the charter, using the argument that, because of the seller's misrepresentation, A had never become a shareholder under the law of British Columbia. The report of the case does not state why this law applied, but probably it was taken for granted that the contract was made there and that the lex loci contractus governed the entire contract. A comparable case came recently before the Supreme Court of the United

21 For comparative municipal law see Yehia Tag-Eldine, Le dol français et la misreprésentation anglaise, contribution à l'étude de la théorie du consentement et de ses vices. (Vol. XVI: Bibliothèque de l'Institut de Droit Comparé de Lyon, 1926.)

22 American Seamless Tube Corp. et al. v. Goward [1930] 3 D. L. R. 870 (B.C. S.C.); fortunately, the court adds that the contract would have been voidable under California law, too.
States.23 A mutual insurance company, chartered in New York, became insolvent. Assessments were adjudged in proceedings in New York against the policy holders regarded as members under New York law, and suit for enforcement was brought against residents of Georgia at their domicil. The Georgia Supreme Court refused enforcement on the ground that the policy was a contract made in Georgia and therefore governed by Georgia law.24 Under the New York statutory law, the policy holders were liable to the assessment, but according to the law of Georgia they were deemed not to have become members of the company, a clause on the back of the policy being insufficient to produce this effect. Although in this case protection of residents was conspicuous, the reasoning was simply based on the law governing the contract.

(ii) In 1897, a German reinsurance company in the Rhineland, the Aachener Rückversicherungs A.G., consented to a reinsurance contract for three-fifths of a fire risk in Japan with an insurance company of Hamburg, through an agreement made in Japan by the agents of both parties. The company in Aachen contested the validity of the agreement because its agent had not been made aware of the unusual fact that the other two-fifths of the risk had been covered previously by another reinsurance. The Reichsgericht applied articles 1110 and 1117 of the French Civil Code, in force in the Rhineland at the time of contracting, as the law of the domicil of the debtor.25

Conflicts rules. Aprioristic theory, again, has postulated that the personal law of the party whose assent is concerned, should govern,26 or that the lex loci contractus must necessarily determine this problem of validity,27 but courts in

---

26 For the national law among others: 8 Laurent 228-229 § 158; Pilet, Principes 448 § 238; Bartin, 1 Principes 175, 177, 2 id. 60; Audinet, 1 Mélanges Pilet 78; Frankenstein 572. For the domiciliary law, Pilet, 2 Traité 289 § 537; Lewald 239 No. 296. Contra: Weiss, 4 Traité 392 n. 4; Kosters 774; and decisively Batiffol 336ff. §§ 381-384.
27 Foote 402; 2 Beale 1225; Rollin, 1 Principes 481 § 291; 2 Arminjon 234 II § 97.

Switzerland: BG. (April 10, 1896) 22 BGE. 471, 483; 32 id. II 416; 38 id. II 519;
England, 28 Belgium, 28a the United States, and Germany have instinctively applied the same law that would govern the contract if it were valid. In the United States, this has been, as usual, either the law of the place of contracting, 29 that of the place of performance, 30 or the law intended by the parties. 31 In Germany, the Supreme Court and other courts in the last decade have firmly upheld the law of the contract, 32 and finally this attitude has found the deserved theoretical recognition. 33 Frail French authorities at present are understood as aiming at the same effect. 34

The Hague Draft Convention (1951) on conflicts rules concerning sales of goods has adopted this view in applying even the law stipulated by the parties to the consent problems. 35 Occasionally courts have resorted to the law of the forum. This happened in England, when the foreign law did not seem to guarantee annulment of a contract made under duress, 36 in a case of the German Reichsgericht dis-


The German Reichsgericht argued similarly in two or three isolated cases.


29 Cases: 2 Beale 1225 § 347.1; but in Elbro Knitting Mills v. Schwartz (1929) 30 F. (2d) 10, the "Michigan contract" was not questioned.

30 Cases: 2 Beale 1226 § 347.1 ns. 1-6.


32 RG. (Dec. 5, 1911) 78 RGZ. 55: sale of membership in a limited private company, error on the money paid in; OLG. Hamburg (Sept. 27, 1918) Hans. GZ. 1918 HBl. No. 92, aff'd, RG. (March 11, 1919) 95 RGZ. 164; sale of nuts, the price payable in Vienna, Austrian law applied to the excusable ignorance by the German buyer of a German war decree; RG. (Oct. 30, 1926) 39 Z.int.R. 276, 281, Revue 1928, 523 (duress); (June 13, 1933) IPRspr. 1933, 31 (fraud); and many older cases, see the list established by Lewald 240 No. 297.

33 Wahl, 3 Z. ausl. PR. (1929) 782; Nussbaum, D. IPR. 237; Batiffol 340 § 386; see also Nussbaurn, Principles 178, and Arminjon, 3 Travaux du comité français de droit international privé (1937) at 94.

34 Batiffol 343 § 389.

35 Conférence de la Haye de droit international privé, 7ème session, 1951, Actes 382; 1 Am. J. Comp. Law (1952) 275.

CONTRACTS IN GENERAL

regarding the Turkish law on employment, and in one or two American insurance cases involving misrepresentation of the insured. The most characteristic of these decisions is that by the English Court of Appeals in *Kaufman v. Gerson*. The defendant, a woman, had promised the plaintiff, her husband's creditor, to pay the debt in consideration of his promise not to prosecute her husband criminally. Under English law, the contract would have been bad because its object was to stifle a prosecution and it was obtained by coercion. However, the places of contracting and of performance made it a French contract, and under French laws, supposedly, the promise was valid. The court argued, however, that enforcement in England would violate the rule that the plaintiff must come into court with clean hands. The decision deserves the severe criticism it has suffered, since opinions are and may well be divided on the existence of unlawful coercion when a creditor attempts to obtain satisfaction of his valid claim by threatening legal sanctions.

3. Want of Consideration

The common law requirement of consideration has a parallel in the much-debated requirement of the French Civil Code (arts. 1108, 1131) by which an obligation must have *une cause licite*: "An obligation without cause or on a false cause or on an illicit cause can not have any effect."

---

88 Fidelity Mutual Life Ins. Co. v. Miazza (1908) 93 Miss. 18 at 36 and 422 at 435, 46 So. 817 at 818 and 48 So. 1017 at 1018. In John Hancock Mutual Life Ins. Co. v. Yates (1935) 50 Ga. App. 713, 179 S. E. 239, the court operates on the assumption that the materiality of representations made by the insured in his application affects the remedy only and therefore is to be decided under the law of the forum.
90 For comparative municipal law, see LORENZEN, "Cause and Consideration
To believe a considerable part of the French doctrine, this provision includes the rules that in onerous contracts a promise must have an actual counterpart in a promise or in a giving or doing by the other party, and that on principle, with exceptions, obligations ought not to be separated from their economic background. Central European systems, however, use other forms of thinking that do not need this general requirement.

Any law governing the contract will naturally determine the requirement of consideration.

The Supreme Court of the United States in *Pritchard v. Norton* applied the law of the place of performance, according to the presumed intention of the parties, thus preventing the contract from being held invalid for want of consideration under the *lex loci contractus*. There are parallels to this decision in England and France. The American cases referring the question to the *lex loci contractus* seem to consider this law as governing the entire contract. For German courts, the application of the law of the contract follows as a matter of course.


42 See on the vast controversies, ESMEIN in Planiol et Ripert, 6 Traité Pratique, in particular his own thesis at 350 § 252.

43 British Controlled Oilfields v. Stagg (1921) 66 Sol. J. 18 (applying English law expressly stipulated for in the contract); In re Bonacina Le Brasseur v. Bonacina [1912] 2 Ch. 68, 73 (validity under Italian law conceded although the action is dismissed on other grounds).

44 App. Paris (Feb. 28, 1935) Revue Crit. 1935, 748 applying French law as *lex loci solutionis* to a German-created bill of exchange, see comment by BATIFFOL, Revue Crit. 1937, 434. The Court of Cassation (req.) has affirmed the decision, (Dec. 14, 1937) Nouv. Revue 1938, 131, on the basis of German *lex loci contractus*, in a laconic reasoning, well explained in the note *ibid.*: under German law the bill was valid but the action could be refuted by pleading that the plaintiff would be enriched without cause.

45 BATIFFOL 353 § 408 n. 5.

46 Bay. ObLG. (July 6, 1904) 5 Bay. ObLGZ. 357 (force of an I. O. U. not indicating the ground of obligation); OLG. München (April 13, 1929) Zeitschrift für Rechtspflege in Bayern (1929) 365 cited by LEWALD 244 No. 302 (consideration required by English law). See also supra p. 364 n. 15.
Recently, the Tribunal de la Seine dealt with several strange agreements made in New York by German refugees, whereby a man promised huge sums to his wife and daughter, without any visible motive and as was supposed, with no intention of making a gift. The court thought it probable that the promise was void under the German law, applicable as presumably intended by the parties, but added that, if approved by German law, the agreement would be void under French imperative public policy. This is one of the easy ways of dealing with obscure facts; the case could have been conveniently solved under the German Civil Code.

II. Nature and Effects

1. The Nature of the Contract

The law applicable to an obligatory contract should determine what kind of a contract is made.

Illustration. Before the German Civil Code came into force, a promise to deliver goods to be manufactured with materials owned by the promisor was considered in the courts following common (Roman) law as a sales contract, whereas the Prussian Landrecht assumed that a contract for work and labor entitled the customer to cancel his order. In several cases one party was domiciled in the territory of the common law and the other in that of the Landrecht.

Instead of treating each party as debtor according to his own law, as was done in other cases, the German Supreme Court subjected the entire contract to the law of the promisor. No one thought of resorting to the law of the forum.

A deterrent example of a contrary reasoning may be found in a case of the Swiss Federal Tribunal, influenced by the two unnatural theories which recommended splitting the contract

47 Trib. civ. Seine (July 5, 1939) Revue Crit. 1939, 450.
48 RG. (May 13, 1891) 2 Z.int.R. 587. For other German cases, see Lewald 248 No. 306.
and characterizing its nature according to the *lex fori.*

A resident Swiss, having executed by letter an acknowledgment of a loan of £3250, to an English woman domiciled in Paris, demurs to an action for recovery, brought by an assignee, because he has not received the money. What law determines his plea? In this case, suitable for an elementary law class, the Federal Tribunal argued as follows: First, it is considered that the making of a loan contract, under French law, requires as in Roman law the transfer of the money to the borrower as an essential prerequisite; that under Swiss law the mutual consent of the parties suffices to create contractual rights of the borrower to receive and of the lender to recover the money; and that English law is still different, the court using an unusual term probably meaning that English law does not make a promise to lend or borrow specifically enforceable. The court considers, further, that under the French approach no contract has been made, unless the money was given, hence, the question would be one of formation, governed in Swiss conflicts law by the *lex loci contractus.* If, however, under the Swiss construction, the contract originated independently of delivery, the issue would be merely one of the requisites for recovery, pertaining to the “effects” and determined by the law chosen by the parties or, subsidiarily, by that of the place where repayment is due. In this dilemma, remembering that a court characterizes problems according to its own domestic law and citing Nussbaum, the Federal Tribunal resorts to the Swiss construction of a loan as a consensual contract and reaches the law of the place of performance which is—the French law.

Thus, because under the Swiss Code of Obligations a loan may originate by mere consent, the French Civil Code is applied, under which it may not! Even the harmful division between validity and the effects of contract can be worked out in a more suitable way than by the domestic construction. It was the task of the court candidly to interpret its own dubious conflicts rule and to state, once and for all, whether the problem is attributable to “validity” or to “effects.”

49 BG. (Nov. 7, 1933) 59 BGE. 397.
The Restatement, at least, does not fail to explain that any requirement for making a promise binding is determined by the law of the place of contracting (§ 332,d).

The law of the contract, no doubt, should include all requisites for validity as well as the legal category of the transaction and, therefore, its legal effects.

2. Intended and Legal Effects

Most courts do not hesitate to include interpretation of a contract in the law which governs the whole of the contract. They also apply this law to the questions, who obtains rights through the contract, and what is the object of these rights. For it is plainly not feasible to consult two different laws for determining the extent of the contractual duties, the one when they are to be inferred from construction of the parties’ intention, implied in fact, and the other when they flow from legal rules completing an agreement, implied in law.

In the narrower domain of interpretation, the natural conception was adopted in this country over a century ago by the Supreme Court of the United States. When two sureties in New Orleans signed a bond payable in Washington, D.C., the court held that, in the absence of a stipulation to the contrary, their liability was joint, according to the common law of the District rather than divided in half under Louisiana law.\(^50\) Nobody then doubted that the bond was subject as a whole to the law of the place of performance, a rule also applied by the Supreme Court in *Pritchard v. Norton.*\(^51\)

Analogous results may be found in many decisions relating to legal effects of contracts.

Nevertheless, the Restatement, influenced by a few cases, has confused the matter. It determines “the nature and extent of the duty for the performance” by the *lex loci contractus* (§ 332, f), but declares “the duty for the performance” to

---

51 *Supra* n. 42.
be “discharged by compliance with the law of the place of performance.” (§ 358). It is instructive to see how hard Stumberg tries to apply these contradictory tests. He deals with an Oklahoma case where a contract granting an automobile agency was made in Michigan with the Ford Company and the agency was to be maintained in Columbus, Ohio. The plaintiff in obtaining the contract acted for the benefit of a company in which he took an altruistic interest and invested money to help manage the agency. The court applied Michigan law as the *lex loci contractus* to the “execution, interpretation, and validity.” Hence, the breach of the contract by the Ford Company was found not to entitle the third beneficiary to sue for damages, nor the promisee who sued as assignee. The decision, as Stumberg recognizes, might have been otherwise, if the center of the contract had been sought in Ohio without clinging to the mechanical use of the *lex loci contractus*, although perhaps the facts relevant for equity were not fully published. However, Stumberg wonders whether this problem would fall under the “extent of the duty” or the “compliance with the duty,” especially the determination of “the person to whom performance shall be rendered” (§ 366), and asks: “Is it practically possible to draw a line sharply dividing the extent of the obligation of the contract from its performance?” Our answer has been given before and is strictly: No.

3. Interpretation of Terms

*Rules of interpretation.* It is a settled principle that rules of interpretation contained in the law governing the contract must be applied to the exclusion of those of the *lex fori.*

---

52 Stumberg 245 n. 74 continued on p. 246.
54 Supra p. 452; and see the vain efforts in the Restatement itself, § 332 comment c, to solve the “difficult problem” of separation of duty and performance. For another consequence see hereafter p. 538.
55 Story §§ 272, 280.
But doubts have long been raised against this principle.\textsuperscript{56} In fact, if the contract is mechanically governed by the law of the place of contracting, there is no consideration provided for the circumstances under which parties envisage performance in another country. Moreover, we might hold this principle to be objectless to the extent that the various rules of interpretation are superseded by the proposition recognized in national laws as well as in the international practice as a "general principle," that we must always look for the real and harmonious intention of the parties when they bound themselves.\textsuperscript{57} On this basis, the court of any country must pay natural and necessary regard to the foreign origin of an instrument.

\textit{Ascertainment of true meaning}. Thus, in a leading English case, a Brazilian in Brazil executed in the Portuguese language a power of attorney, granting authority to a London broker to buy and sell shares. The Court of Appeals, before deciding what law determined the extent of the authority, held that the exact meaning of the declaration ought to be ascertained through interpreters and experts according to the (C. C. A. 9th 1942) 130 F. (2d) 582. The courts adhering to the \textit{lex loci contractus} commonly enumerate construction and interpretation as well as validity as subject to this law.


\textbf{Germany:} RG. (March 15, 1892) JW. 1892, 220 No. 27; (April 6, 1911) 24 Z.int.R. 305.

\textit{Código Bustamante}, art. 184 with exceptions.

In principle, though with exceptions, the law governing the contract also includes the force allowed to \textit{commercial usage}, see 1 \textit{Recht des Warenkaufs} 62; this problem will be studied with particular reference to sales contracts.

\textsuperscript{68} See 2 \textit{Bar} 34; 7 \textit{Laurent} 582 §§ 479-482; \textit{Despagnet} 896 § 302; \textit{Surville} 332 § 219; \textit{Valéry} 978 §§ 678ff.; all inspired by \textit{Boulleinois}.

language and the habits at the place of transaction. 58 A charter party between two German corporations contained clauses usual in English maritime trade, including an exception clause, a cessor of liability clause, and an indemnity clause. 59 In another case, a vessel was insured, both parties being German corporations doing business in New Guinea, with the general conditions attached in English. (Institute Time Clauses). 60 In both cases, the German Supreme Court stated the meaning of the English original, although the contract was governed by German law. Indeed, in all cases of party statements and agreements, the true meaning must be discovered under full observation of all circumstances. This may be supposed to be provided for in practically all municipal laws 61 and does not touch conflicts problems.

Reference to local conceptions. Neither is conflicts law affected, when it appears that parties expressly or probably referred to the conceptions of a place other than that of contracting. It has been held that in a fire insurance policy an indication of time was to be computed according to the law of the place where the property covered was burned, 62 and with respect to a contract of accident insurance prescribing that packing should be done in the presence of an adult, that who was an adult ought to be determined by the law of the place where the packing was supposed to be done. 63 To explain such decisions as though they referred to the law

59 RG. (May 22, 1897) 39 RGZ. 65.
60 RG. (November 7, 1928) 122 RGZ. 233.
61 M. Wolff, Priv. Int. Law 461 § 432 calls attention to the English rule of construction that words of an instrument must be interpreted from the context, or understood in their plain and literal meaning, and requires that this rule be not applied in interpreting a contract governed by French, German, or Swiss law. This is correct; but the same is true and recognized by the English courts when the instrument is executed abroad, irrespective of the applicable law.
of the place of performance,\textsuperscript{64} is inaccurate. The packing firm had nothing to “perform,” nor had the insurance company to “perform” at either of the two places mentioned. Also, it could well have been that a commercial usage might have interpreted time or adult quality differently from the general law of the contract, and the former would have prevailed.

It follows, at the same time, that German courts are wrong when they purport to apply English law as an exception to German law governing the entire contract, whilst they simply ascertain the significance of certain clauses inserted in a bill of lading or an insurance policy according to English usage.\textsuperscript{65}

It is a definitely distinguishable phenomenon that the parties or conflicts rules may subject a part of the contractual relationship to special applicable laws. What is to be done in interpreting foreign expressions has been well said to be really a question of fact.\textsuperscript{66}

The rule of the law of the contract in itself, however, is perfectly sound.

III. Legality

In the Anglo-American conflicts literature, the doctrine of “illegality” has been singularly inflated and confused by sweeping English dicta relied upon by Beale. We have to state the correct opinion to this effect:

(a) The pertinent question is not whether the “making” or the “performance” of a contract is prohibited, but whether or not the contract is valid and enforceable by the applicable law, which is the law governing the contract as a whole. This observation needs no proof, although it seems to be widely neglected.

\textsuperscript{64} 2 Beale 1261 ns. 2 and 3; Stumberg 263 n. 18, 245 n. 73.

\textsuperscript{65} See the cases supra n. 55 and Bay.ObLG. (Oct. 14/28, 1912) Recht 1913 No. 70, cited by Nussbaum, D. IPR. 242 who seems to approve of it in principle.

\textsuperscript{66} Note, 23 Harv. L. Rev. (1910) 563.
SCAPE OF THE LAW OF THE CONTRACT

(b) The law of the place of contracting (if it does not govern the contract) is immaterial, and its prohibitions without any importance, as expounded earlier.

(c) The law of the place of performance as such is of no greater significance.

(d) The rules of private law of the forum likewise should not obstruct the application of foreign law, except in extraordinary cases.

The two last contentions will be developed here and in the next chapter, respectively.

One of Dicey's rules reproduces the assertion of English judges that a contract valid under its proper law is nevertheless void if prohibited by the law of the place of performance. Repeatedly, renowned judges have connected this alleged rule with the broader proposition that English courts should not sanction the breach of the laws of other independent states. The principal thesis, alone contemplated here, recurs in the municipal English law of obligations and, according to critics, belongs only to that branch of law; in fact, it has been used in no case where a law other than English law or the law of the place of performance itself governed the contract. The Restatement of the Law of Conflicts, however, has elaborated on this rule:

"If performance of a contract is illegal by the law of the

67 Supra Chapter 29, pp. 399-401.
68 Dicey 788, exception to Rule 153.
71 MANN, id. at 111.
place of performance, there is no obligation to perform so long as the illegality continues."\textsuperscript{72}

The comment assumes that a local prohibition at the place of the intended fulfillment makes the contract unenforceable at any place, although this law does not govern the contract (or in Beale's theory, its validity).\textsuperscript{73} Again, the rule re-appears in the American Restatement of contracts law. But Williston at least indicates how uneasy he feels about this unreasonable dogma; and in a somewhat forced argument, he leads the discussion to the result that illegality under any nongoverning law does not itself kill or paralyze an obligation.\textsuperscript{74}

The mistake, indeed, is of a double nature. Neither (1) has the place of performance in conflicts law the absolutely dominant role which Dicey and Beale believed; nor (2) does a prohibition of the contractual performance absolutely eliminate the contractual duty in the law of obligations.

In the first place, we are carried back to the unfortunate attempts to bisect the contract so that it may be governed by different laws. The defects of this method appear patent here. If payment in gold coins, traffic in narcotics, prices exceeding a ceiling, are forbidden in any country, this does not mean that the contract is blameless while performance is reproved. The "great difficulty" admitted by Beale is in distinguishing what is illegality of contracting and what is illegality of performance, subject to different law; this difficulty must be immense, since the only material case is that

\textsuperscript{72} Restatement § 360.
\textsuperscript{73} Restatement § 360 comments b and f.

Also the Polish Int. Priv. Law, art. 10 has a similar provision: "The parties are bound by the specific legal prohibitions annulling transactions contrary to law, provided that they are in force in the states (sic) in which the debtor is domiciled and the obligation is performable by him." This obscure provision does not appear in the Czechoslovakian drafts or the law of 1948.

\textsuperscript{74} Restatement of the Law of Contracts § 458 comment b; Williston, 6 Contracts 5923 § 1792; note the embarrassment of Jenks, 1 Digest of English Civil Law (ed. 3, 1938) 132 § 307.
where the contract itself is vitiated because of a prohibition of performance.

In the second place, we may contend, as a result of investigations that cannot be repeated here, that under all modern laws controlling obligations, although with some variety and occasional uncertainties, a debtor will be excused from his duty of specific performance (where this duty is recognized) by impossibility or frustration; and that his duty to pay damages for nonperformance is released, if impossibility or frustration is not included in the risk to be borne by the debtor according to the individual contract or suppletive legal rules. 75

As a simple result, we have to look to the governing law, none other, to ascertain whether any obstacle laid in the path of performance, frees the debtor from his duty of specific performance, if any exists, and from damages. English courts are certainly not more ready than others to excuse the debtor in any venture. Let us contemplate the leading case principally claimed to support the thesis of Dicey and Beale and many more prudent assertions in the English and American literature.

The Ralli case 76 was decided under English law to the effect that an English firm was held not bound to pay a certain freight difference. The firm had sold jute to a Spaniard in Barcelona and, in a charter party made in London with a Spanish shipping company, agreed to a freight rate for carrying the jute from Calcutta to Barcelona. Half of the freight was to be paid by the buyer upon arrival as part of the purchase price. The Spanish law having established a maximum freight for jute, the buyer refused to pay more. Did the court really hold English law to be that, because of a Spanish prohibition, the Englishman did not owe the

76 Supra n. 69.
freight promised by him? This would cover the usual proposition, but the court would certainly not have agreed to such an untenable ruling. If a German firm had bought cotton in New York at the market price, to be paid on sound arrival in Hamburg and the German state had decreed a ceiling price for cotton, it is not very probable than any American court would hold the contractual right to the price unenforceable. What characterized the case was the fact that the freight in question, half of the contractual amount, should have been paid by the Spanish buyer to the Spanish company in Spain. Although one of the judges remarked that he did not look beyond the immediate issue, it seems evident that the English seller, if bound to pay the difference, would have lost his recourse against the buyer in a Spanish court, and that this was the reason why it seemed equitable to send the Spanish company back to the law of its own country.

Whether such equitable considerations, not quite unfamiliar to English and other courts, are sound in municipal law is of little interest here. The really decisive consideration, pointing to the distribution of risks, a consideration grounded in a model English tradition, was admirably followed by the Privy Council in a few weeks after the Ralli case, and very neatly formulated in the following American decision.

The Tweedie Corporation of New Jersey, owner of the vessel “Catania,” let the ship on hire to the McDonald Corporation of West Virginia by a written contract in New York, where both companies entertained offices. The vessel was to transport laborers on four trips from Barbados, an English colony, to Colon. New York law evidently governed. After two trips had been made, the British government prohibited any export of workers from Barbados. The performance,

77 See Jacobs, Marcus & Co. v. The Crédit Lyonnais (1884) 12 Q. B. D. 589.
79 Tweedie Trading Co. v. James P. McDonald Co. (1902) 114 Fed. 985; other cases are discussed by 2 Beale 1263 § 360.2.
thus, was not impossible but illicit in Barbados. Did this prohibition of performance by the law of the place of performance excuse the hiring company from payment or even invalidate the contract? The court, somewhat perturbed by the confused authorities, nevertheless penetrated to the decisive consideration. In the spirit of the contract, as the court assumed, the McDonald Corporation had to carry the risk of the change of laws of a foreign government at the place of performance. This rigor may be approved or disapproved, but the solution is sought in the correct field of excuses for nonperformance according to the governing law of New York, and the risks contemplated by the parties directed this decision.

IV. Nonperformance of the Contract

I. In General

Apart from the questionable theories establishing a separate law applicable to performance, in principle the law governing the contract determines all its effects, including the requisites of default, excuses for nonperformance, and the effects of unexcused failure to perform.

The English Law Reform Act of 1943, in modernizing the rules of restitution in various cases of failure of consideration, expressly presupposes that the contract is governed

80 Especially BEALE 1158, 1267, 1274; in France, VALÉRY 987 § 685; Judge Learned Hand in Louis-Dreyfus et al. v. Paterson Steamships, Ltd. (1930) 43 F. (2d) 824 recognizes that liability and excuses for nonperformance must follow the same law, but nevertheless, following the Restatement, excuses the debtor under Canadian law from the fulfillment of a Minnesota contract. Cf. NUSSBAUM, 51 Yale L. J. (1942) at 917 n. 149; BATTIFFOL, 261 n. 1, 407 n. 2.

81 United States: BATTIFFOL 407-408 n. 2 recalls the constant practice in the cases concerning insurance and transportation.


Austria: OGH. (Oct. 24, 1928) 10 SZ. 609.

France: NIBOYET, 16 Recueil (1927) I 83; LEREBOURS-PIGEONNIÈRE 397 § 358.


Switzerland: BG. (June 28, 1918) 44 BGE. II 280 (intention of the parties).
CONTRACTS IN GENERAL

by English law. The Act is understood thereby to subject the right of restitution to the law of the contract and has been criticized on this ground because this right should be governed by the law of the place where enrichment was obtained. But while undue enrichment in general may have to follow extracontractual lines in both substantive and conflicts law, consideration or an advance payment given on the ground of a contract is to be recovered under contractual rules. Even though, in the part concerning contracts, a code may refer to its rules relating to undue enrichment, as the German Code does, it is well settled that the relation created by the contract extends to the duty of restitution. Hence, German and Swiss courts apply the law governing the contract, and a similar rule has probably been adopted in the draft of the Montevideo Treaty in 1940.

Illustration. The English Act repeals the rule in the Fibrosa case that a party who prepaid money under certain accidental circumstances may recover all the money paid,

82 The Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40.
83 G. L. Williams, 7 Modern L. Rev. (1944) 66, 69.
84 Williams follows GUTTERIDGE and LIPSTEIN, "Conflicts of Law in Matters of Unjustifiable Enrichment," 7 Cambr. L. J. (1939) 80.
85 See BGB. §§ 323 par. 3, 325 par. 1 sent. 3; §§ 346, 347, 348 make clear that restitution on the ground of rescission is not identical with recovery of undue enrichment.
86 Germany: Under the common law: RG. (June 18, 1887) 4 Bolze No. 26; Bay. ObLG. (Nov. 16, 1882) 38 Seuff. Arch. 260, still regarded as leading cases by Nussbaum, D. IPR. 295 n. 2. Under the actual practice, the courts apply the law of the place of performance of each party with respect to his obligation. If a buyer has paid the price in advance, he may recover after rescission, under the law of the place where he had to pay under the contract. For the cases see LEWALD 252 No. 311 sub (2). RAAP, IPR (ed. 1) 296ff. adds support by examining the practical results. ZWEIGERT, "Bereicherungsansprüche im Internationalen Privatrecht," Süddeutsche Juristenzeitung 1947, 247-253 at 252.
87 Switzerland: BG. (Nov. 1, 1952) 78 BGE. II 385, 389, Revue Crit. 1953, 401. Montevideo Treaty, draft of 1940, art. 43 says that the obligations arising without contract are governed by the law of the place where the act is done from which they derive "and, in the proper case (en su caso) by the law governing the legal relations to which they correspond." This obscure text seems best construed as above.
and the payee is not allowed to deduct his own damage and expense. Suppose that an English firm has paid a sum under an English contract to a party in a British jurisdiction in which the Reform Act has not yet been adopted, why should the payee not profit from the new and unquestionably just law governing the contract rather than depend on the place where by a casual circumstance the money was paid? 88

The Restatement, it is true, applies its section concerned with the quasi-contractual obligation of restitution in an illustration, to an agreement whereby A promises to build a house for B on B's land. The promisor starts on the building but does not complete it. When he sues B to recover the amount by which A's labor and materials have benefited B, the law of the place where the land is, allegedly applies. But in the illustration, fortunately, it is this law that allows the recovery. 89 Otherwise, it would have been difficult to defend the nonapplication of the law decisive for all of the contract.

2. Sanctions of Nonperformance

The unity of the contract must naturally be preserved also with respect to the several sanctions of nonperformance. 90

*Rescission.* Whether a party is entitled to cancel a contract and what restitution is due in this case by either party, is determined by the law of the contract. 91 Beale, who would

---


89 Restatement § 452 illustration 3.

90 E.g., German Reichsgericht (Jan. 10, 1911) Warn. Rspr. 1911, No. 111: the right to exercise a lien is governed by the law of the contract rather than that of the place where the right is exercised.

have preferred the law of the place of performance, explains the cases by the theory of the courts that the right of rescission flows from a sort of implied contract. But this, indeed, is the correct theory, inasmuch as it acknowledges a right inherent in the contract.

**Damages.** The old conception that damages exclusively pertain to the procedural law of the forum, has maintained as little force with respect to breach of contract as with respect to tort. The right to recover and the measure of damages in a violated contract are determined by the law governing the contract. This law also extends to the question whether damages may be obtained in addition to rescission. Occa-

---

Dittmer (1921) 51 Cal. App. 512, 197 Pac. 365; James N. True v. Northern Pacific R. Co. (1914) 126 Minn. 72, 147 N. W. 948.

As an example of application of the foreign law stipulated by the parties, see Rubin v. Gallagher (1940) 294 Mich. 124, 292 N. W. 584 (partial recovery of paid installments in a title-retaining sale).


France: Cass. (civ.) (May 12, 1930) S.1931.i.129, Clunet 1931, 164ff.; BATIFFOL 405 § 490.


2 BEALE 1275 § 373-1.

The procedural theory was maintained in Massachusetts as a hangover from the past: Grimshaw v. Bender and Dana (1809) 6 Mass. 157; Ayer v. Tilden (1860) 15 Gray (81 Mass.) 178; Ives v. The Farmers' Bank (1861) 2 Allen (84 Mass.) 236.


Quebec: See 3 Johnson 394 n. 2.

Germany: RG. (March 27, 1903) J.W. 1903, 184; (Jan. 21, 1908) Leipzig. Z. 1908, 308, and many subsequent cases; RG. (March 24, 1933) IPRspr. 1933 No. 14.


Cass. (civ.) (May 12, 1930) supra n. 91.
sionally, as in tort, it happens in this country that a court wrongly denies the right to damages because of a different construction in the domestic law. The Michigan Supreme Court in *Mount Ida School v. Rood*,\(^6\) refused to enforce the right of a school to a contractual fee under an agreement recognized to be governed by Massachusetts law, because the plaintiff asked for the full amount allowable in Massachusetts, instead of deducting at once in his own complaint the costs he would have incurred in case of performance, as prescribed in Michigan. The court, to avoid the "illogical and unjust result" of Massachusetts law, resorted to the public policy of the forum and has been justly criticized therefor.\(^7\)

**Penalties.** The same law may be expected to apply to the various types of penalties stipulated in contracts. This has been constantly recognized by the German courts resorting to the law governing an obligation in order to determine the validity of a penalty promised in case of nonperformance or delay,\(^8\) the concurrence of the right of penalty with the right of damages,\(^9\) and the question of waiver.\(^10\)

The same is probably true in this country,\(^11\) with one restriction. The purpose in agreeing on a penalty may be either to fix a lump amount of damages or to punish the defaulting debtor irrespective of damage, both valuable stip-

---


\(^8\) RG. (March 15, 1892) 2 Z.int.R. 477; RG. (Dec. 1, 1911) 22 Z.int.R. 311; and other cases.

\(^9\) RG. (Jan. 5, 1887) 19 RGZ. 33 (penalty clause under English law).

\(^10\) ROHG. (Feb. 1, 1875) 16 ROHGE. 14; OLG. Dresden (July 10, 1891) 2 Sächsisches Archiv für bürgerliches Recht 650, cited by LEWALD No. 375a.

\(^11\) Restatement § 422 (1); First American Nat'l Bank of Nashville v. Automobile Ins. Co. (1958) 252 F. (2d) 62, 64.
ulations when the evidence of actual damage is difficult to obtain, the latter method also being useful to secure promises lacking any pecuniary estimation. Nevertheless, some American courts persist in believing that all liquidated damages are punishments and that they are unenforceable despite the fact that their purpose is not “to punish an offense against the public justice of the state” but to grant a civil right to a private person.\textsuperscript{102} These courts are said to be supposed to refuse enforcement to a promise that they regard as a penalty, although it is valid under the law considered by these courts themselves as governing.\textsuperscript{103}

An analogous public policy was once announced in a German decision which reduced an agreed sum by application of the domestic provision contained in the Civil Code that the judge should mitigate an exaggerated penalty according to his discretion.\textsuperscript{104} It has been correctly objected that such reductions cannot be essential, since the German Commercial Code allows no such judicial mitigation.

\textit{Moratory interest allowed as damages.} Finally there is no reason why, on principle, damages for delay in a money payment fixed by law at some percentage of the principal sum, should not be governed by the law of the contract.\textsuperscript{105}

The contrary decisions of the French Court of Cassation are

\textsuperscript{102} Words of Mr. Justice Gray in defining statutory penalties with respect to judgments not falling under the Full Faith and Credit Clause, Huntington v. Attrill (1892) 146 U. S. 657, 673-4.

\textsuperscript{103} Restatement § 422 (2); \textit{Beale} 1340 § 422.1 cites only two cases of 1889 and 1893, respectively.

\textsuperscript{104} Germany: BGB. § 343; OLG. Hamburg (Dec. 23, 1902) 59 Seuff. Arch. 63, 14 \textit{Z. int.R. 79. Contra: see 2 Frankenstein 232; Lewald 257.}

Similar, Switzerland: BG. (Feb. 25, 1915) 41 BGE. II 138.

On the other hand, in Brazil, 2 \textit{Pontes de Miranda} 210 states that a Brazilian court may exercise a German-created right of mitigating a penalty, art. 927 of the Brazilian C. C. not being based on public policy.

\textsuperscript{105} Germany: RG. (Feb. 20, 1880) 1 RGZ. 59, 61; (Jan. 8, 1930) Hans. RGZ. 1930 B 211, 214.
obsolete.\textsuperscript{106} But in the United States, it is said that the law of the place of performance applies.\textsuperscript{107} Since the cases alleged for support mostly refer to negotiable instruments, which, in fact, are in a special category, we shall reserve the question for a later opportunity.

3. Burden of Proof

We may repeat the statement made in the discussion of torts that, in the prevailing theory, except in English courts, burden of proof is controlled by the law governing the substantive rights.\textsuperscript{108}

V. Change of Law

The prevailing view seems to be that in any law suit the law governing a contract applies in the form in which it is in force at the time of the final decision.\textsuperscript{109} Rules of law repealed after the making of the contract are inapplicable and replaced by the current rules. This opinion is in conformity with the view set forth in this work that all references to a foreign law as applicable to a certain question are directed to the whole law of the foreign state, to the body of its system susceptible of alterations, and not to a few selected rules.

\textsuperscript{106} Batiffol 413 § 503 has only alleged correct decisions of lower courts, but the decision Cass. (civ.) (May 15, 1935) S.1935.1.244 clearly recognizes the law of the place of contracting as that intended by the parties, cf. Esmein, 10 Z.ausl.PR. (1936) 884.

\textsuperscript{107} 2 Beale 1335 § 418.2; Stumberg 266 n. 28.

\textsuperscript{108} Lorenzen, 32 Yale L. J. (1923) at 332 n. 74; supra pp. 283-286.

Germany: RG. (April 17, 1882) 6 RGZ. 412; (Oct. 29, 1925) 79 Seuff. Arch. 353 No. 215; (May 19, 1928) 82 id. 289 No. 164.

The application of the \textit{lex fori} in England has been reaffirmed by an Admiralty Court judge and the Court of Appeals in The Roberta [1937] 58 Ll. L. Rep. 159, 177; [1938] 60 id. 84, 85.

\textsuperscript{109} England: \textit{In re} Chesterman’s Trusts [1923] 2 Ch. 466, 478.


Germany: RG. (Jan. 27, 1927) and (March 22, 1927) IPRspr. 1926/27 No. 42 with more documentation; RG. (May 26, 1936) JW. 1936, 2058.

Italy: Cass. (March 6, 1940) Rivista 1941, 166.
Occasionally, in this country, a contrary idea has been advanced, as if the applicable law were that existing at the time when the contract was made. The New York Court of Appeals thought it necessary to excuse a deviation from this alleged principle, when it applied the Joint Resolution of Congress abrogating the effect of gold clauses to bonds issued previously in New York, the new law being constitutional and representing the public policy of the forum.\textsuperscript{110} Evidently, such opinions are stimulated by the doctrine prohibiting retroactive laws from impairing vested rights. But our subject should not be confused with constitutional problems.

At any rate, the New York Court argued on the presumption of an intention of the parties to submit to the laws of New York. There are cases, in fact, in which the parties may well be supposed to have tacitly agreed on a reference to a law merely as it was at the time. However, as seen earlier, it is controversial whether the parties are allowed to do so.\textsuperscript{111} As a rule, no such temporary limit should be understood to inhere in either an agreement or an intention of the parties; too many difficulties would be raised in ascertaining a substituted law. In fact, the Joint Resolution of 1933 has been applied in a great number of decisions in various countries as a subsequently enacted part of New York law governing bond debentures.\textsuperscript{112}

Similarly, the main part of the German Law of Revalor-

\textsuperscript{110} Compañía de Inversiones Internacionales v. Industrial Mortgage Bank of Finland (1935) 269 N. Y. 22, 26, 198 N. E. 617.

It is entirely distinguishable that under the Georgia Code (1895) § 288o, (1933) § 57-106 "every contract bears interest according to the law of the place of the contract at the time of the contract," and therefore a defendant's plea that the contract was usurious according to a certain Alabama law, was dismissed, because the defendant had not proved the existence of that law at the time of the contract; see Thomas v. Clarkson (1906) 125 Ga. 72, 54 S. E. 77; and for subsequent cases, Jones v. Lawman (1937) 56 Ga. App. 764, 770, 194 S. E. 416, 420. This regards a cause of initial defect in the contract.

\textsuperscript{111} Supra Chapter 28, p. 395.

\textsuperscript{112} See the surveys in Z.ausl.PR. Vols. 9-11.
zation of 1925, prescribing that certain debts expressed in "Mark" currency should be due in the amount of a percentage in new "Reichsmark," was regarded without hesitation as an alteration of the German law.

Only the peculiar provision of this law was much contested whereby a debtor having redeemed a mortgage with heavily depreciated money was bound to add some supplementary payment. While some courts of other countries repudiated this retroactive law under the point of view of public policy, a Dutch court argued that a Dutchman, having bought a house in Germany, paid the mortgage effectively under the law then existing, and resold the house before the new law went into force, had no connection with Germany and could not be affected by German legislation. The court, thus, denied the continued effect of the governing law rather than its retroactivity, a view of great force.

Finally, obligations entered into under the Czarist Russian legislation before the 7th of November, 1917, were prohibited by Soviet legislation from being brought before the courts. In agreement with the prevailing opinion, a Swiss court held that as a consequence Soviet law replacing the former law made the obligations in question unenforceable also in Switzerland. While the objection of public policy to the legislative impairment in this case was expressly denied, it might be granted under circumstances where the contract has sufficiently close connection with the forum, as when the debtor resides in the forum at the time of the decree. But even so, obligations expressed in Czarist roubles are without

113 See the cases *infra* Chapter 33, p. 569 n. 46.
114 Rb. Rotterdam (June 13, 1930) W. 12266.
object.\textsuperscript{118} Cases seem to be rare in which it may be reasonably argued that an old Russian contract survives under some substituted law.\textsuperscript{119}

In conclusion, we may state the principle that changes in the applicable law must be observed, except where a contrary agreement of the parties is ascertainable and permitted by the law of the forum.

\textsuperscript{118} Lehman, J., in Dougherty v. Equitable Life Assurance Society (1934) 266 N. Y. 71, 105, 193 N. E. 897, 910.

\textsuperscript{119} M. Wolff, Priv. Int. Law 426 § 406 makes the interesting suggestion that a revolutionary overthrow of the existing law and its replacement by something new is not included in a choice of law by the parties. In my opinion, this is a question of interpretation, as also with respect to less exorbitant changes of law, such as the Joint Resolution on gold clauses. The difficulties, however, of a new choice of law made necessary by the suggestion, may be great.