CHAPTER 33

Public Policy

I. THE LAW OF THE FORUM

A. THE PRESENT SITUATION

The manifold objections raised against a free choice of law by the parties have proved without foundation except as justified by resort to the public policy of the forum. Equally, it has been indicated, despite various assertions, that neither the law of the place of contracting nor that of the place of performance has a paramount role in regulating the legality of transactions, but the forum may have a word to say. At the same time, it has appeared that resort to the public policy of the forum is a delicate and very rarely justifiable measure.


In the continental literature, every writer on conflicts law has discussed the problem. Basic: Kahn, "Die Lehre vom Ordre Public (Prohibitivegesetze)," first in 39 Jherings Jahrb. (1898) 1-112, 1 Abh. 161-254. Bibliographies by Nibolet, 10 Répert. 92, 1 Streit-Vallindas 315-317. Marty, "Der Vorbehalt des eigenen Rechtes im internationalen Privatrecht der Schweiz," (Abhandlungen zum Schweizer. Recht, ed. Gmüir-Guhl, No. 176, 1940). More recent articles by Louis-Lucas, "Remarques sur l'ordre public," Revue 1933, 393, and Valéry, "Examen critique des remarques sur l'ordre public de M. Pierre Louis-Lucas," 61 Revue Dr. Int. (Bruxelles 1934) 194, continue the French dispute on the elements of which ordre public consists. Are there one (Nibolet, Manuel 547 § 443); or two, namely, (a) in the prevailing distinction ordre public interne and international (Weiss, 3 Traité 94) or (b) rather relative and absolute (Lainé, Annuaire 1908, 47); or three (Louis-Lucas); or four (Valéry) elements?

For a complete survey on the German practice until 1932, see Melchior 324ff.

2 Supra pp. 429-431.
3 Supra p. 537.
Under these circumstances, some observations on the influence of public policy are indispensable in the present connection, although we have not attempted any such generalizations in the field of family law. In fact, while the common habit of treating public policy in conflicts law in comprehensive terms is quite unsound, the controversy on this much debated subject has a special meaning for obligations. The need for security of transactions involving family or inheritance may well mean that the state of domicil or nationality should be privileged to regulate the individual’s marriage, adoption or will. The social policy of such state and its conception of family interests have some claim to be preferred over the legal systems of places where parties merely happen to meet. Where personal law and contracts law clash, however, as in the question of the capacity of married women to undertake obligations by contract, the solution is controversial; American courts are divided in recognizing the policy of the domicil or that of the state of contracting as predominant. We have supported the English intermediary proposition that for business contracts the law governing the contract should apply to the exclusion of domiciliary policy.\(^4\) Special considerations apply also with respect to transfer of possession or title; any influence of contracts on personalty or realty may be excepted from this chapter.

**Uncertainty.** Interstate and international contracts not concerned with family or inheritance rights and not directly affecting possession or title, are secure only if they are removed as completely as possible from the play of local policies and predilections alien to the purpose of the contract. Nevertheless, time and again, though but sporadically, courts have measured contracts with the yardstick of their local conceptions, whether because one party was a resident of the forum—a regrettable approach sometimes shared by New York

judges; or because the agreement was completed by a "final" act within the forum — a view sanctioned by the Restatement's exaggerated formalism; or on the ground of the parties' national connection — as frequently but unjustly claimed by French and Latin-American jurisdictions. In a number of cases, contracts have been subjected to the "public interest" of the forum without any connection with its territory.

The various general formulas used in enactments referring to the exception of public policy, though sometimes worthy of attention, have been of no practical help. The Código Bustamante establishes special rules for obligations but recognizes "international public order" on an extremely vast scale. A recent law of Guatemala characteristically deprives foreign law of all effect if it is "contrary to the national sovereignty, the laws and the public order."

By common agreement, not all municipal legal rules are a potential obstacle to the application of foreign law, not even by any means all those considered "imperative" in the domestic sphere. Only a "strong" public policy in the words of the Restatement (§ 612), or an "international public order," as the internationally relevant part of the national public policy is commonly called in France, prevent enforcement of the law referred to by a conflicts rule. Just what rules pertain to this class remains in intentional obscurity. The fantastic use of the doctrine made in certain judicial decisions has been shown in lists of horrible cases collected long ago.

Over and over again, writers have emphasized that the cases cannot be forced into any system, which is quite true in the present state of things. Any scholar in any country, devoting himself to a study of habits of court in this field, must feel exactly as did the observer in this country who declared that

6 See Makarov, Quellen, Systematisches Register p. 6; Niboyet, 10 Répert. 92 ff.
6 Arts. 175-182, 246.
7 Law on Foreigners of 1936, art. 23.
8 See, for instance, Kahn, 1 Abhandl. 169, 214-217, 247 n. 132, 248-251; I Frankenstei n 186.
he retired baffled from an examination of the American cases:

"The conclusion must be, then, that a clearly developed and defined concept of public policy cannot be found in the cases. ... We do know enough to say with considerable confidence that an investigation to determine when the courts will apply the doctrine of public policy to deny the recognition of a foreign right would result in the conclusion, 'you never can tell.'" 9

You never can tell! The worst feature of the traditional latent conflict between private international law and municipal law is precisely this resultant uncertainty. For the sake of relatively few doubtful cases, the sword of Damocles hangs over each and every contract. The courts usurp a discretionary power when to apply conflicts rules and when to sacrifice them, a freedom exercised at the cost of the parties' freedom to contract outside the forum. The antiquated loose talk of comity between states, not having any contractual rights to be enforced, perpetuates a feeling that conflicts rules are inferior to internal rules. 10 But, for a long time, the best informed scholars and judges have agreed that an unqualified reservation in favor of the law of the forum is a menace to extrastate business activity. The great majority of writers, it is true, have been satisfied with the disconsolate and resigned statement that there is no rule or method of forecasting. Perhaps, most of them share in the conviction of the courts that public policy ought to remain as an unlimited safety valve, although they want it used only as an exception.

**Full Faith and Credit Clause.** In the United States, the application of public policy in conflicts law must be distinguished from "matters of local concern" exempted from the constitutional duty of states to enforce the laws and acts of

10 See for illustration the summary in 15 C. J. S. 836, 837 and the cases in ns. 27-29 ibid.
sister states. Although the Full Faith and Credit Clause contains potential force to develop federal conflicts rules, only few rudimentary elements for such development have appeared. All theories for delimiting the domain of the Full Faith and Credit Clause on the basis of the cases have failed. As was stated in 1935, "it seems reasonably clear . . . that the Supreme Court has not constituted itself an arbiter in all conflicts cases and that there is a field, albeit of indeterminate boundaries, where the public policy of the state may hold sway." 11

At the beginning of 1945, a long series of elaborate decisions had led the Supreme Court to a point where one of the Justices declared:

"I cannot say with any assurance where the line is drawn today between what the Supreme Court will decide as constitutional law and what it will leave to the states as common law." 12

It is certainly true that a slight connection of a case with the forum not only makes application of the domestic law ludicrous but ordinarily also calls for the sanction of the Full Faith and Credit Clause. 13 But the inverse would not be true. Although remaining in the sphere of constitutional independence, a court is by no means entitled to impress local views on foreign transactions. The conflicts rule binds the court. Confusion is sometimes encountered even in recent cases. A federal court sitting in Missouri considered a clause of restraint of trade stipulated in the employment contract of a branch manager. 14 The clause was valid according to Missouri law and void according to Michigan law. The employee had never been in Michigan; the contract was negotiated in St.

11 Nutting, supra n. 9, at 205.
13 Stumberg 279, Note in fine.
Louis and performed first in Illinois and thereafter in St. Louis. The one thing done in Michigan was that the company, resident there, assented to the contract. The court explains that authorities are divided between *lex loci contractus* and *lex loci solutionis*, but that the true answer, independent of both, is given by the principle laid down by the Supreme Court of the United States that a state has to enforce a sister state’s law under the Full Faith and Credit Clause, except where its own public policy prevails. In the case at bar, Missouri had a major interest, while Michigan had practically none. This is true, but if the contract had had sufficient connection with Michigan to render the application of the Michigan law natural, it would be very improper for a Missouri court to declare the clause valid despite the Michigan prohibition, whatever its so-called “interest.” Public policy validating foreign void agreements is possible but rarely asserted, and for good reasons. Thus, the conflicts question should have been plain. The decision was correct for the simple reason that the entire contract was centered in Missouri.

**Due Process Clause.** From the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, it has been occasionally deduced that a state may not resort to its own public policy to invalidate a contract made and consummated in another state. It was thus decided in 1934 that clauses of an insurance contract entered into in Tennessee in the presence of the parties and their employees, valid according to a decision of the Tennessee Supreme Court, could not be challenged in Mississippi at the domicil of the insured.\(^\text{15}\) The Supreme Court expressly recognizes that a state cannot enlarge the obligations of the parties to accord with every statutory policy.\(^\text{16}\) While similar reasonings may normally

\(^{15}\) *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* (1934) 292 U. S. 143.

\(^{16}\) *Id.* at 149; *Home Insurance Co. v. Dick* (1930) 281 U. S. 397, 407-8.
be based also on the Full Faith and Credit Clause, the Due Process Clause can be used to cover the observance of the law of foreign countries.

American repugnance to the use of the exception. Fortunately, American writers and courts are more reluctant than all others to avail themselves of this exception. The issue has been clarified by frank emphasis on the independent reasons of policy supporting conflicts law.

"There surely is a policy both of good morals and commercial stability in giving legal effect to agreement lawfully made. To deny enforcement to the foreign made contract makes the state of the forum a shelter for those who refuse to perform their legal obligations. Unlike the cases where a court refuses relief to persons in pari delicto, such a rule penalizes the obligor who, by hypothesis, was doing nothing forbidden by law when and where his contract was made. Both morality and expediency are opposed to such a conclusion. Fortunately, we may say with high confidence that this attitude is passing . . . we become not only less suspicious towards other people's food and customs, but of their legal institutions as well." 18

English courts are more impressed by regard for international comity, requiring the recognition of the legislation of other independent states, 19 but the result is similar, inasmuch as public policy serves only exceptionally to bar the application of foreign law. The courts are anxious to limit the public policy doctrine to "clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds." 20 It is true, however, that the English extension of procedural, penal and

17 Beale 1651 agrees with the protest: the resort to the exception "should be extremely limited. This is especially true between the states of the United States."
jurisdictional prerogatives reduces such liberality in many instances, 21 although this is more notable in the field of torts.

Recent European reaction. This highly desirable progress in the general American attitude must be anxiously preserved, in face of a strange literary reaction coming from Europe's darkest currents of nationalism. Writers have consciously yielded to a resurgent spirit that militates against the "liberal" and "cosmopolitan" tendencies of the nineteenth century. The usual approach has been reversed. Public policy, far from furnishing a rare exception to conflicts law, is now elevated to the foremost principle, and application of foreign law subordinated, as a mercy granted when convenient to the domestic system. No longer a kind of nuisance, resort to the law of the forum is deemed an organic element of conflicts law. The Italian sources of this new theory seem to flow from fascism, on the one hand, and from the theories of "reception," on the other. That foreign law must not only be referred to by the conflicts rule but also "received" into the domestic law, has become a dangerous proposition. It will suffice to quote in translation a few passages found in texts of writers who would not have been expected to foster such views:

The principle followed thus far as basis of the internationalistic conception, ought to be reversed by applying the logically opposed nationalistic conception. This application purports to consider the problem of the clause of reservation or of public order, as a problem of interpretation. The foreign law may be enforced as special internal law in the cases of international nature, provided that it can be assumed that the legislator has intended its enforcement as such. . . . Where such application cannot be founded upon the most probable intention of the legislator, automatically the internal common law re-enters into force, that is, the territorial law. 22

In the first place, the assertion seems legitimate that . . .

22 Pacchioni, Elementi 207-208.
the limitation by public order constitutes in a certain sense a part of every rule of private international law. In every conflicts rule a clause must be considered implied to the effect that... foreign rules are referred to only to the extent that the insertion of such rules into the internal legal order does not disturb the harmony of its system.  

Recently, such a voice has been heard in this country. Nussbaum encourages the courts to a more uninhibited use of the public policy doctrine on the ground of local conceptions of the conflict of laws. In his opinion, the tendencies against public policy were caused by “liberal” and international-minded illusions and still more by “dogmatic” preferences.  

"... in the question of 'public policy,' obnoxious though this concept may appear from the cosmopolitan point of view, the latter would practically lead to the weakening of a country's position vis-a-vis of foreign powers."

"English and American courts... are most hesitant to resort, in terms, to public policy. ... In a few cases courts have tried to rationalize their reserved attitude, but the reasons advanced are unconvincing. The explanation must probably be sought in the liberal tradition of the common-law courts. ... Liberalism postulates international-mindedness favorable to the recognition of foreign law...

"Antipathy to public policy is not confined to common law courts. It is even more intense in the majority of continental writers. To them, it is the 'Cerberus' lying at the threshold of International Private Law.... In fact it is not so much liberalism of the English brand as internationalist dogmatism that is behind the prevailing attitude of Continental learning. ... The most important part of the American problem of public policy bears upon interstate relations. With respect to this area, American writers have taken a particularly strong

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23 Agó, Teoria 319-320.
25 Nussbaum, op. cit. preceding note at 200.
stand against the use of public policy. . . . Nevertheless, the several states, having been left in the possession of an almost unlimited legislative power in the private law field—a power actually exercised on the largest scale—they can hardly dispense with the protection provided by the public-policy rule against the infusion of disturbing elements which may result from contrary legislative policies of sister states." 26

Is it necessary to say that even the most rigid positivism can afford to give conflicts rules established by the state itself the same value as other state law? Or to point out that perhaps liberalism but certainly not preconception enters into the cause when arbitrariness is utterly disliked?

B. THE PROBLEM

The familiar formulas, declaring the priority of "public policy, laws of the state, and morality" or reservations of "imperative laws and good morals" are too vague and comprehensive. Others, more modestly referring to public order and good morals, are exploited far beyond their literal meaning. If you establish a conflicts rule on the premise that a certain situation of living should be governed by a certain foreign law and at the same time declare that this same situation under unspecified conditions may require resort to the law of the forum, you have indeed deprived the conflicts rule of its legal character and reverted to the fabulous "comitas gentium," which negatived legal rules of international behavior and left every decision to uncontrollable courtesy. Perfectly well aware of this line of thought, courts like to repeat the old slogan of comity every time they consider a possible breach of their otherwise recognized conflicts rules.

In the field of contracts, it would seem that the difficulties caused by the multiformity of our legal systems may be considerably alleviated, if territorial claims of state legis-

26 Nussbaum, Principles 113, 115, 123.
lation are definitely confined to those branches of law that have to serve public interests.  

1. Policy of Public, Especially Administrative, Law

The prudent Roman jurists had a trichotomy of *leges perfectae, leges minus quam perfectae, and leges imperfectae*, according to whether contracts violating a legal prohibition were void, punishable only, or not affected by any sanction. Modern legislators, with their multitude of commands and prohibitions, rather take for granted the rule that offending agreements are void, and leave to the courts the laborious task of construing this or that prohibition so as not to affect validity. Despite such attempts at restrictive interpretation, innumerable criminal, fiscal, and especially administrative provisions do entail, often by natural consequence, sometimes wantonly, the nullity or at least unenforceability of contravening agreements. A purpose of general state administration or of the welfare of the population in general, is protected by interfering with private law. Sales of poison, arms, or liquor, employment of children, creating of monopolies, stipulations of gold clauses, trading with the enemy, are ordinarily void to the extent that the transactions are forbidden, not to mention contracts to overthrow the government, or to forge money.

On the other hand, it is still true, after every imaginable controversy in the last decades, that in establishing the rules of behavior characteristic of private law, the state fulfills its own interest only insofar as it is interested in fair justice as the basis of mental and physical happiness. The particular

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²⁷ The Continental literature discussing "territorial" law or *lois de sûreté et police* sometimes approaches the distinction used here. Particularly NIBOYET 550 § 443; 10 Répert. 95 No. 7, distinguishes public order from imperative laws, and NEUMEYER, 4 Int. Verwaltungs R. 251, 431 separates public law from public policy. However, nowhere to my knowledge has the view advocated in this chapter been supported.
rules serve in the first place the interests of individuals and organizations rather than those of state or society.

If a state, not contented with the broad inroads of modern public law into the former spheres of private law, considers every substantive rule as mingled with consideration of community interests, it is logical to deny the existence of private law as the National-Socialist writers have done; they tested even the name of “Civil Code.”

If a continuing fundamental difference between private and public law is conceded, the position of conflicts law in the meaning of private international law appears distinctly attached to private law alone, while administrative and fiscal rules have their own scope to be delimited for each according to its specific purpose.

It will perhaps be objected that the distinction between private and public law, not familiar to the older common law, has been blurred in the civil law countries by wide spheres of mixed policies. However, the interference of public interest, great as it is, proceeds in discernible directions. To take the most important example, modern labor law is composed of two parts.28 The one, pertaining to public law, which regulates the relations of employers and employees to the state and other public corporations, has been extended to include legislation on working hours, women and child labor, social insurance, organization of unions, or compulsory representative bodies, labor boards, and the procedure for settlement of labor disputes. The other part consists of the rules relating to individual contracts of employment as well as to collective bargaining. That a tariff convention is a contract of private law has been deduced in German law from the three points of view that the parties are private

28 See Hueck in Hueck and Nipperdey, 1 Lehrbuch des Arbeitsrechts (1931) 8, who points out that this essentially theoretical question has a great practical significance for jurisdiction of courts and application of the general rules concerning contracts. Our query furnishes a third practical angle.
persons, the form is that of a private contract and the purpose is the regulation of private relations.29

In certain situations where the border line between private and public relations may seem doubtful, the difficulty of deciding on the exception of public policy exists under any theory. It is nevertheless certain from the objective point of view of critical jurisprudence that, for instance, a statutory provision prohibiting premature termination of an employment contract pertains to private law, when it is a perpetual regulation of the time requisite to give notice, since, then, it primarily protects the private interests of the workers and the enterprises, while it belongs to public law when it is an emergency measure in a temporary national crisis of unemployment.

To analyze the significance of this distinction, however, we have to contrast the application of domestic law with that of foreign law.

Public law of the forum. The distinction is of great importance with respect to the various kinds of substantive rules of the forum. Prohibitions, established in public law, apply irrespective of the conflicts rules accompanying private law institutions. As an example, we may recall the principles elaborated in the American courts before Prohibition, in the application of the laws of “dry” states against the sale of intoxicating liquor.

A court of a dry state, as a matter of course, had to enforce its own statute for the purpose of general welfare. Except insofar as the legislature was restrained by constitutional provisions, an annotator said, the state could forbid any action for the recovery of the purchase price of intoxicating liquor, even

“with respect to a sale every element of which, from the solicitation of the order to the consummation of the executed

29 NIPPERDEV in 2 Lehrbuch, just cited n. 28, (1932) 131 § 12.
contract by delivery of the goods, had its situs in another state the law of which permitted such sales; and this, too, without reference to any intention upon the part of either party to violate or evade the laws of the forum."  

When a court, however, was not bound by a statute, it would not refuse to entertain such an action merely because the sale, if made at the forum, would have been invalid, when there was no intention to violate or evade the law of the forum. Thus, a sale made outside the state was commonly enforced even though the order was solicited by an agent in the state. But some local statutes were construed as prohibiting also such preliminary steps, or as outlawing any transactions that contemplated introduction of the liquor into the forum.

All this resembles private international law but is essentially independent. Whether the object of a sale be liquor or anything else, no such grounds for invalidity as error, lack of authority of a representative, or incapacity to contract, nor the problems of nonperformance have ever been subjected to the law of a jurisdiction where negotiations have merely started. No statute would undertake to impress its normal domestic rules on contracts, "every element of which has its situs in another state." A state may also think it suitable to insist on annulling a sale of intoxicating liquor, narcotics, or weapons, despite an agreement of the parties submitting them to another law, although there is no other reason for challenging this choice of law by the parties.

If thus, for fundamental clarification, we have to recognize the need of a separate delimitation of each administrative prohibition of the forum, it must be emphatically postulated that legislators and courts confine them within narrow boundaries. Extensions such as those described above relating

30 Note, Conflicts of laws as to sales of intoxicating liquor, 61 A. L. R. (1903) 417, 418.
31 E.g., Wind v. Iller & Co. (1895) 93 Iowa 316, 321, 61 N. W. 1001, 1002.
32 STUMBERG 404.
to the domain of liquor laws, or of many tax statutes, do not favor a sound development of international law, either administrative or private. In many cases, reasonable interpretation may well be satisfied with applying a domestic administrative prohibition exactly to the same contracts that ought to be governed by the private law of the forum, namely, the contracts centered there. Interfering with private contracts for purposes of general welfare is a matter delicate enough and should not be aggravated without cogent reasons by attacks on foreign contracts too.

When a contract, however, is not within the local domain of the forum's prohibition, the ordinary conflicts rules apply. The courts know perfectly well that beyond those limits, an administrative policy of the forum is not usually susceptible of being taken as an absolute standard, overriding conflicts law and foreign law. A contract made and to be performed in Mexico could produce an action for payment of delivered intoxicating liquor, enforceable in Arizona despite the Eighteenth Amendment then in force. While, the court said, there were previous cases reluctant to enforce a foreign transaction which the law of the forum would disapprove, later decisions have realized the necessity that the course of trade

"... should be encouraged and fostered for mutual welfare. Of those Mexicans with whom we make valid contracts in this country, we expect faithful performance or the right to secure redress through Mexican courts. Adverse decisions on grounds of policy will breed suspicion or discrimination against us. We should be careful not to give less than we expect to receive."

Sunday contracts. Another informing example is the treatment of Sunday contracts in American courts. Among eight

cases cited by Beale,

In one case, under the *lex loci solutionis*, and in two cases where the contract was made between persons present and naturally subject to the law of the place of contracting, invalidity was pronounced, evidently for individual equitable considerations. Only one case remains where the court had some chance to validate the contract under the law of the place of payment, but invalidated it under the law of the forum, in which all other elements were located, as the court took care to state. Far from reading into the domestic statute an absolute standard of religious behavior, the courts are acutely aware of the territorial limits. Prevailing in this field implements the policy described by Williston whereby in the main, "the courts have been astute so to interpret contracts as to find them not to conflict with Sunday statutes or to hold them to have become executed and, therefore, unassailable." In a similar way, it has been held in British Columbia that a contract of indemnity for bail, there illicit, is enforceable when made in proceedings in the State of Washington

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2 Beale 1233 ns. 1 and 6 and 1235 n. 6.

35 Swann v. Swann (E. D. Ark. 1884) 21 Fed. 299, Caldwell, J., declaring that the prohibition of Sunday contracts in Arkansas is not meant to constitute a strong public policy; Brown v. Browning (1886) 15 R. I. 422, 7 Atl. 403 (contract made in Connecticut after sunset on Sunday valid by Conn. statute); McKee v. Jones (1890) 67 Miss. 405, 7 So. 348 (sale of a horse, clearly governed by the law of Louisiana where it was permitted); Watkins Co. v. Hill (1926) 214 Ala. 507, 108 So. 244. Adde Stamps v. Frost (1935) 174 Miss. 325, 164 So. 584 (terms agreed upon on Sunday in Tennessee, executed on Monday; contract would have been void if agreed to on Sunday in Mississippi).

38 Brown v. Gates (1904) 120 Wis. 349, 97 N. W. 221, rehearing denied (1904) 98 N. W. 205. See the comment by Batiffol 50 n. 1.

39 Strouse v. Lanctot (Miss. 1900) 27 So. 606 (judgment for a resident who had been persuaded by a traveling salesman on a Sunday to order a number of suits); Lovell v. Boston & Maine R. Co. (1910) 75 N. H. 568, 78 Atl. 621 (the waiver of liability of the railway invalidated, but nevertheless the liability affirmed on torts principles, the action being an "action on the case").


Williston, 6 Contracts 4816 § 1700.
where the agreement is lawful, such contract not being "inherently repugnant to moral and public interests."  

In a Texas decision, the antitrust laws of Oklahoma were held to prevent enforcement of a contract made in Minnesota, but performable in Oklahoma. Only because the Oklahoma statutes were not proved and were presumed to be identical with the Texas antitrust law the latter was applied; an added reservation of the court’s right to limit "comity" may be taken as harmless.

**Foreign governing law.** We are on traditional ground, when a transaction is governed by a foreign private law and declared void by this law as a consequence of a provision of its public law. Although rarely expressed in the literature, the opinion seems common everywhere that on principle a foreign-governed contract is subject to all prohibitions of the governing law, irrespective of their purpose. The foreign private law applies, whether or not it is influenced by administrative law.

For what reason the private law of Michigan avoids a contract governed thereby—be it because of measures exercised under the police power or because of measures for the protection of children, employees, or insured persons—is of no concern to the private international law of other jurisdictions. When a corporation is doing business in a foreign state without authorization and that state avoids contracts thus made, the nullity is recognized wherever the law of that state is held to govern the contract. Continental courts decide in the same way.

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43 See supra pp. 205 n. 147, 213 n. 188.
44 E.g., OLG. Hamburg (May 23, 1907) Leipz. Z. 1908, 249.
This principle, of course, is exposed to the exception of the public policy of the forum, when the latter clashes with the foreign public interest underlying the decision of the private law problem. War measures of the enemy are absolutely incapable of enforcement. Exchange restrictions serving economic warfare in times of political peace, confiscation, or impairment of private property, when reaching beyond the borders of the foreign state, are repudiated.\(^4^5\)

2. Policy of Private Law

If, thus far, judicial practice as a whole agrees with the facts of international legal life, the problem is different in the narrower sphere of the typical interests safeguarded by private law. The problem is this: Should such social policy as pursued in insurance or usury statutes, or the economic policy inspiring national legislation on the liability of public carriers override the court's own conflicts rules? For in all these cases the interests of the individual customers are primarily protected, although the frequency of these contracts is deemed to warrant special legislation.

To face the problem more closely, the premise of this inquiry may be remembered, namely, that the contract at bar is not sufficiently connected with the forum to call for the application of the \textit{lex fori} as the governing law; on the contrary, the contract is considered to be centered in a foreign jurisdiction. The question, then, is: Should this contract, nevertheless, be affected by the policy of the domestic law concerning private interests?

It is submitted that this question should be strictly answered in the negative, and that the courts, particularly the American courts, prevailingly do reach the same result, although a few cases here and there uphold the pretension of an unrestricted sovereign discretion.

While we shall continue to discuss the present role of public policy with each particular subject, we may contemplate here some popular prototypes of a paramount policy of the forum.  

C. EXAMPLES

1. Wagering Contracts

Foremost under the typical examples of contracts unenforceable under cogent laws of the forum are gambling and wagering contracts. Differences of legal treatment are frequent enough, particularly with respect to the more serious problems of speculative bargains, to provoke conflicts of laws. A well-known decision of the New Jersey Supreme Court of 1884 demonstrates the intransigent point of view. A speculation in stocks upon margins was validly undertaken under the rules of New York, but the court declared it an offense against "the plain public policy" of New Jersey, because a transaction of exactly the same kind would have been unlawful there. Enforcement, thus, was refused against a resident of the forum. As Goodrich observed, "it would be hard to find a more striking instance of an 'intolerable affectation of superior virtue'—the famous words of Judge

46 For an outstanding example of a borderline case, we may refer to the provision of the German law on revalorization of 1925, mentioned above p. 549, which revived debts paid with heavily depreciated money. Public policy was advanced as an objection by Trib. civ. Seine (April 9, 1930) Clunet 1930, 1012 and Trib. Genève (May 31, 1930) Revue 1930, 395, and implicitly by the French Cass. (civ.) (April 14, 1934) S. 1935.I.201, justly criticized by NIBOVET ibid. The exception of public policy was, however, disregarded by Trib. Mixte Cairo (Feb. 17, 1930) Clunet 1931, 467, and thoroughly refuted by the Swiss Federal Tribunal (Feb. 26, 1932) 58 BGE. II 124, 126. BARTIN, Note, Clunet 1931, 470 asserted territorial limits for retroactive laws. ARMINJON, Revue 1930, 385 claimed that the German law was inapplicable as "political." The French Court of Cassation in another case, Cass. (req.) (Oct. 19, 1938) Gaz. Pal. 1938 II 886 reached the same result by interpreting the intention of the parties as directed to extinguishing definitely the debt; see contra the note ibid. For a more powerful argument see supra Chapter 32, p. 549 and n. 114.

Beach—by one state toward another." That the Restatement has adopted this decision is inconsistent with its own praise of uniform enforcement of rights acquired in other states. But what in this country may count as an irregular solution, commonly occurs in many, if not most European jurisdictions. The domestic restrictions on dealing in futures are either regarded as an absolute moral standard, or as an ineluctable screen of protection for the domiciliaries of the forum. Thus, the prevailing French doctrine always refuses enforcement, if it would be denied by the French law of 1885, which, it is true, allows a relatively large place for dealing in futures at exchanges. Where the contract is unenforceable under the foreign governing law itself, even though this law may follow from party agreement, this prohibition, too, is mostly observed. The elaborate German law distinguishes between valid dealings at German stock and commodity exchanges (requiring specific personal qualifications) and unenforceable speculative contracts. All foreign transactions that would be subject to the exception of wager, if made in Germany, are unenforceable against persons domiciled in Germany. Moreover, agreements involving business at legitimate foreign exchanges, such as an order of a domi-

48 Goodrich, op. cit. supra n. 1, at 171.
49 Illustrations respecting gambling debts and dealing in cotton futures, to § 612.
50 See Brandl, Internationales Börsenprivatrecht (Marburg 1925) 156ff.; Amieux, 2 Répert. 442 No. 21ff.; Niboyet, 10 Répert 92.; Gutzwiller 1572; Brandl, 2 Rechtsvergleichendes Handwörterbuch 599.

For Switzerland, see 58 BGE. II 52; 61 id. II 117.
51 See for citations Amieux, 2 Répert. 443 Nos. 24, 27; Pilet, 2 Traité 239, 240 § 514; Survil 359ff. § 248; Niboyet, 10 Répert. 132 No. 240 bis, 246. To the same effect, Institute of International Law (Paris 1910) Revue 1910, 956.

Switzerland: C. Obl., art. 513; the identical section of the former text has been treated as of public order, BG. (Feb. 10, 1905) 31 BGE. II 55, 60; (Feb. 2, 1932) 58 id. II 48, 52; (June 4, 1933) 61 id. II 114.
52 German Exchange Law (Börsengesetz) of 1908 § 61; BGB. §§ 762, 764; RG. (Feb. 7, 1899) 43 RGZ. 91; (July 8, 1899) 44 RGZ. 52, 54 and many subsequent decisions. See Staub-Heinichen in 4 Staub § 376, Anhang 66 n. 80, 100 n. 197.
ciliary to a broker in Liverpool to New York to sell or buy cotton or coffee at the local exchange, or to sell stock for delivery "ultimo" at the Stock Exchange in Paris, is open to the exception that effective delivery or reception was not intended; foreign transactions, it is explained, are not certain to afford the public the same guarantees as institutions under the control of the German government. In well-deserved criticism, this attitude has been termed an offense against the natural international boundaries. The Anglo-German Mixed Arbitral Tribunal refused to consider the German notions. The Reichsgericht, however, drew a further undesirable consequence from them, by applying the principle that prohibited contracts may not be enforced by agreement for foreign arbitration, jurisdiction, or foreign law.

As another example of intolerance, a recent Belgian decision refuses enforcement to a stock exchange operation validly made in Paris, if it can be proved that the parties did not intend factual delivery of the securities. The Seine Tribunal even held that because the French law prohibited "le pari aux courses de chevaux" other than "pari mutuel," a partnership to exercise a license of the Hungarian Jockey

53 RG. (Jan. 30, 1917) 89 RGZ. 358.
54 RG. (Oct. 14, 1931) 134 RGZ. 67, 70.
55 RG. (July 13, 1901) 41 RGZ. 59; the New York broker was represented by an agent in Hamburg, but this does not change this aspect of the case. RG. (June 15, 1903) 55 RGZ. 183 involved stock transactions at exchanges in New York and Chicago.
56 89 RGZ. 359, supra n. 53. The Austrian Supreme Court extended the domestic absolute prohibition on grain dealings in futures to foreign transactions and seems to have been followed in this claim by the Czechoslovakian Supreme Court (March 2, 1934) 10 Z. ausl.PR. (1936) 168.
57 BRANDL, supra n. 50, 176, 183.
59 Germany: RG. (May 18, 1904) 58 RGZ. 152 (leading case). For thorough criticism see LUDWIG RAISER, Das Recht der allgemeinen Geschäftsbedingungen (1935) 139, 143 and n. 2. For other countries, see BRANDL, supra n. 50, 209 n. 52.
61 Cf. the analogous American statutes in the cases discussed by WILLISTON, 6 Contracts 4703 § 1665 n. 6.
Club for race betting was unlawful and that a partner could not ask for an accounting on the business done.\textsuperscript{62} Contrary views definitely prevail in the Anglo-American orbit. As is well known, Lord Mansfield's approach in case of a foreign loan given for gambling purposes was different, stressing the fact that the loan was valid where given and resulting in judgment for the plaintiff to the extent of the money lent.\textsuperscript{63} Several cases followed his application of English law \textit{qua lex loci solutionis}, presumably intended by the parties,\textsuperscript{64} while, in a contrary opinion, the English gaming statutes were held to have no bearing at all on foreign games.\textsuperscript{65} In other cases, where the contract made no reference to English localities, actions for recovery of gain in gambling or of a loan for gambling, were enforced on the ground of the validity of the transaction in Baden-Baden\textsuperscript{66} or Monte Carlo.\textsuperscript{67} Whatever law may have been declared applicable, the courts, during the growing complication of British legislation on gaming,\textsuperscript{68} gave no quarter to the exception based on public policy of the forum.

In a case of 1933, a Missouri court thought that "the overwhelming weight of authority in this country is that gambling transactions will not be recognized as valid in states having statutes declaring such gambling contracts and transactions illegal and void, even where they are perfectly valid

\textsuperscript{62} Trib. civ. Seine (June 2, 1922) Clunet 1924, 429. The court simply applied the French law, and as the note judiciously observes, the decision should have referred to the French \textit{ordre public}—as though then it would be correct.


\textsuperscript{64} Story v. McKay (1888) 15 O. R. 69 (note executed in New York payable in Ontario); Moulis v. Owen [1907] 1 K. B. 746 (baccarat game in Algiers, check payable in London).

\textsuperscript{65} Fletcher Moulton, L. J., dissenting in Moulis v. Owen, supra n. 64, at 757; Dicey, Note, 23 Law Q. Rev. (1907) 249, approved in a Note by Sir Frederick Pollock, \textit{id}. at 251.

\textsuperscript{66} Quarrier v. Colston (1842) 1 Phillips 147.

\textsuperscript{67} Saxby v. Fulton [1909] 2 K. B. 208; Dicey (ed. 5) 650 illustration 2 n. (l) approves.

in the state where entered." But the court in this case was clearly impressed by suspicion of many dishonest maneuvers, including false personation, narcotizing tablets, and card sharpers, all this scenario being employed against rustic innocence. Whether really much authority is available, seems doubtful; however, games of chance, indeed are not worthy of serious judicial consideration, nor of scholarly discussion.

With respect to dealings in futures, however, or, in another version, with respect to contracts for commercial objects, although the Supreme Court of the United States has rather purposefully avoided deciding the issue under the Full Faith and Credit Clause, in conflicts law the weight of authority is represented again by holdings of the Missouri courts. Missouri has severe prohibitions against dealings in futures, but these statutes are declared to have no extraterritorial effect on contracts made in other states dealing with the rise and fall of stocks, bonds, and commodities; the recognition includes brokerage contracts made in the state when the transactions are to be performed outside the state. The governing law,

69 Maxey v. Railey & Bros. Banking Co. (Mo. 1933) 57 S. W. (2d) 1091, 1093.
70 Corbin, Cases on Contracts (ed. 2, 1933) 1128 n. 10.
71 Bond v. Hume (1917) 243 U. S. 15. The Supreme Court has not contested however, the view of the Missouri Court in the cases of the following note.
72 Edwards Brokerage Co. v. Stevenson (1901) 160 Mo. 516, 61 S. W. 617; dicta and citations in Elmore-Schultz Grain Co. v. Stonebraker (1919) 202 Mo. App. 81, 214 S. W. 216; Claiborne Commission Co. v. Stirln (Mo. App. 1924) 262 S. W. 387. Strangely deviating, McVean v. Wehmeier (1923) 215 Mo. App. 587, 256 S. W. 1085 applying Missouri law because the contract was made in the state and ignoring the string of cases in point. Cf. in general, Minor 384 § 161, 422 § 176.

The cases cited seem simply to apply the law of the place of performance. But the federal courts have employed various methods in order to validate orders performable on a "contract-market" authorized by federal statute (7 U. S. C. A. §§ 1 ff., Supp. 1945). See Notes, 40 Harv. L. Rev. (1927) 638; 81 U. of Pa. L. Rev. (1933) 881.

The statutes in question, Mo. Rev. Stat. 1939, §§ 4714-4716, 4719, are sharply distinguished from the provisions against bucket shops, Rev. Stat. 1939, §§ 4706-4713, which are considered to make contracts illegal irrespective of transactions on a foreign market, and are not superseded by the federal statutes on grain futures, see Dickson v. Uhlmann Grain Co. (1932) 288 U. S. 188, 196 n. 2. In a subsequent decision, Wolcott & Lincoln v. Humphrey (1938) 119 S. W. (2d) 1022, the Missouri Supreme Court seems to overrule the entire distinction, but in fact emphasizes merely the section, then 4318 (Rev. Stat. 1939, § 4708), which belongs to the bucket shop law.
hence, also determines whether there is a gaming contract.\textsuperscript{73}

Peculiar difficulties seem to arise only from the doctrine that recovery cannot be had on a note or bill or mortgage, illegal or void for want of consideration in the place of performance. On the latter ground, English courts have refused enforcement of a check given as security for a foreign gambling debt but allowed the creditor to sue on the debt itself\textsuperscript{74} and American courts have been influenced by this strange view.\textsuperscript{75}

To justify the German refusal to enforce foreign wagers, the argument has been advanced\textsuperscript{76} that enforcement is a matter of procedure, since in German law an obligation to pay is recognized to the extent that money paid to discharge a gaming debt cannot be recovered.\textsuperscript{77} But in correct analysis, the absence of the right to sue is a defect of the obligation to be classified along with voidness and other forms of inefficacy.

\textit{Lotteries.} Also in the related field of lotteries, several American courts have clearly applied the foreign law. As early as a century ago, when an obligation was entered into to sell lottery tickets in Kentucky, on the basis of an enactment by that state for the benefit of a college, a New York court held that the contract, valid where performable, was enforceable, irrespective of the prohibition of lotteries by New York statutes.\textsuperscript{78} In other cases, the law of the place where the ticket was sold, or a partnership in lottery tickets was formed, has been applied.\textsuperscript{79} But that the policy of the

\textsuperscript{73} Hood & Co. v. McCune (Mo. App. 1921) 235 S. W. 158.
\textsuperscript{74} Moulis v. Owen, \textit{supra} n. 64; Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart [1927] W.N. 78.
\textsuperscript{75} Thuna v. Wolf (1928) 132 Misc. 56, 228 N. Y. Supp. 658, declares the action on the gambling debt itself to be possibly enforceable.
\textsuperscript{76} Kahn, 1 Abhandl. 188 who characteristically referred at the same time to the then treatment of the Statute of Frauds; recently RAAPE, IPR. 92 again argues to this effect.
\textsuperscript{77} See BGB. § 762 par. 1 sent. 2.
\textsuperscript{78} Commonwealth of Kentucky v. Bassford and Nones (1844) 6 Hill 526.
\textsuperscript{79} McIntyre v. Parks (Mass. 1841) 44 Mass. 207; Thatcher v. Morris (1854) 11 N. Y. 437; Roselle v. McAuliffe (1897) 141 Mo. 36, 39 S. W. 274; 2 Beale 1240.
forum does not decide by itself, is the generally accepted doctrine, well grounded in the territorial character of such statutory prohibitions. In a recent revival of Dicey's contrary proposition, it has been asked: Why should the forum be compelled, in a lottery action by or against a resident, to subordinate its policy to the policy of another state? But the answer is simple. The policy of such a law does not extend to every suit coming before its courts nor to all contracts "made" in its territory, but only to the contracts centered within the forum. The old case in the matter of the Kentucky lottery, mentioned before, is correct also on this point.

Indorsed gaming notes. Of particular informative value is a series of cases dealing with innocent indorsees of notes issued to pay gaming debts or to furnish the means for wagering. By a universally favored rule, any illicit cause of an obligation embodied in a negotiable instrument is no defense against an indorsee ignorant of the facts. This, in the vast majority of countries and courts, extends to notes and bills, originating in gambling. The North Carolina court has remarked that it would encourage vice, if a successful gambler could obtain the value of such a note by indorsement and then render his obligation ineffective by pleading his own wrongdoing. Statutes annulling private contracts for reasons of general social welfare, if not handled with great caution, have an unfortunate tendency to defeat their own purpose. However, the Illinois Supreme Court has maintained a practice, allowing the plea of prohibited gambling against an innocent indorsee despite a contrary law governing the indorsement. The practice goes back to a decision where the notes were all

80 Dicey 763 illustration 8, without any case citation to support it.
81 Nussbaum, Principles 123, as example for the thesis quoted supra n. 26.
82 Williston, 6 Contracts 4729 § 1676; Restatement of the Law of Contracts § 590; Falconbridge, 1 Banking and Bills of exchange (ed. 5, 1935) 712. The same is recognized even in Switzerland which has the most intransigent attitude in Europe against wagering, see C. Obl. art. 514 par. 1 in fine.
83 Wachovia Bank and Trust Co. v. Crafton (1921) 181 N. C. 404, 107 S. E. 316.
dated at St. Louis and payable at the same place. The bargain consisted of mere speculations upon the future prices of grain and under Missouri law was void, but this defense could not be objected against an ignorant indorsee who had acquired the notes before maturity. The Illinois court referred to the Criminal Code of Illinois and to its own previous views, to the effect that the transaction was

"Not only contrary to public policy but it is a crime—a crime against the state, a crime against religion and morality, and a crime against all legitimate trade and business."

That this is still the law in Illinois, shows how muddled the considerations of "public policy" are. Such violent moral indignation, of course, may impell a court to protect the bench from contamination with the outrageous foreign law. Not a difference in laws or legal systems but deep-seated moral inconsistency of a foreign-created right with the domestic principles compels resort to public policy. However, the outburst is somewhat misplaced. A wise court should not take the attitude of a conscientious objector, when it is asked to give an innocent indorsee what he would receive in nearly every other jurisdiction.

In the soundest decisions, the exception of public policy, in fact, is reduced to the function of an objectively ascertained moral sense:

"A contract that is valid where made and that does not involve any moral turpitude, and is not pernicious and detestable will be enforced in a state although the laws of such state forbid the making of such contract."

84 Pope v. Hanke (1894) 155 Ill. 617, 630, 40 N. E. 839, 843.
85 Thomas v. The First Nat'l Bank of Belleville (1904) 213 Ill. 261, 72 N. E. 801: although the contract is licit in Missouri and the District of Columbia, it is not enforceable, since it violates the penal laws of Illinois! See for other cases, 38 Ill. Ann. Stat. (1934) 406ff., annotations to § 329; the Supplement of 1944 has no additions.
86 American Furniture Mart Bldg. Corp. v. W. C. Redmon Sons & Co. (Ind. 1936) 1 N. E. (2d) 606 at 609, HARPER & TAINTOR, Cases (ed. 1) 801 (cognovit
2. Various Contracts

Champerty. The old absolute prohibition of "champerty" was conceived as a prohibitory law making void any agreement to share in the future proceeds of a law suit. The traditional English approach that the disapproval affected contracts wherever made is hardly to be encountered any more. On the one hand, the scope of the offense of champerty has shrunk, in the opinion of American jurisdictions, so as to embrace no more than an officious interference, without proper interest, in other people's obligations, and its collateral effects have been more or less weakened. On the other hand, the American courts usually admit any solution offered by the law of the place where suit for enforcement of the debt is brought.

Beale and other writers have reproached this practice for failing to distinguish between prohibited agreements to be governed by the lex loci contractus and prohibited suits, enforceable or not according to the law of the place of performance, which place seems to be identified with the place note validly executed in Illinois; if enforcement were refused, people in Indiana would be invited to fraud by signing notes in Illinois unavailable in their own courts. The decision refers to International Harvester Co. of America v. McAdam (1910) 142 Wis. 114, 124 N. W. 1042; Garrigue v. Keller (1905) 164 Ind. 676, 74 N. E. 523, 527. These cases follow one of the rules in Elisha Greenhood, The Doctrine of Public Policy in the Law of Contracts (Chicago 1886) 46.

87 Grell v. Levy (1864) 16 C. B. N. S. 73; Dicey 762 illustration 3; LEFLAR, Arkansas Conflict of Laws 217 n. 64 points to two Arkansas cases, viz., Arden Lumber Co. v. Henderson Iron Works (1907) 83 Ark. 240, 103 S. W. 185; White-Wilson-Drew Co. v. Egelhoff (1910) 96 Ark. 105, 131 S. W. 208. But these cases deal with notes incorporating ten per cent for attorney's fees, valid under Louisiana law, but declared unenforceable in Arkansas, being private penalties. This is a different type of case.


89 Gilman v. Jones (1889) 87 Ala. 691, 5 So. 784, 787, 7 So. 48. For details see WILLISTON, 6 Contracts 483ff. § 1712; Restatement, Contracts § 542.

90 WILLISTON, 6 Contracts 484ff. § 1713.

91 Richardson v. Rowland (1873) 40 Conn. 565; Gilman v. Jones (1888) supra n. 89; Roller v. Murray (1907) 107 Va. 527, 59 S. E. 421. In Blackwell v. Webster (1886) 29 Fed. 614 the law of the place of contracting was applied.

92 2 Beale 1231; Stumberg 267.
where the court is sitting. At the same time, this border line is described as practically difficult to trace. But the place of the law suit is not necessarily the place of “performance” of an accounting between the parties to the agreement; nor should it be material for the question which statute applies, whether some statutes continue to make the agreement void and the others merely prohibit the law suit. The view of the courts should be supported, not by mechanical rules but rather by the fact that the agreement is centered at the place where the suit is intended to be brought. However, in each of these opinions, the idea of an absolute prohibition affecting all foreign agreements is left far behind.

Other examples. Similarly, it has been held in Alabama that assignment of a life insurance policy to a person with no insurable interest in the life of the insured was validly executed in New York and to be enforced as against the law of the forum, since it comprised nothing inherently bad. The contrary, it is true, has recently been held to be the view of Texas, by a federal court in that state.

Again, general opinion repudiates the use of public policy to enforce the forum’s conception of annulment for duress. Examples can be multiplied.

Protection of personality. Statutory provisions for the protection of workers or employees in employment contracts (not in the class of “territorial” provisions respecting health or morality pertaining to public labor law) regularly apply only as a part of the governing law. Some doubt has affected the restrictions imposed on stipulations in employment con-

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95 Supra p. 525.
96 For other examples see WILLISTON, 6 Contracts 5094 § 1792.
tracts forbidding the employee to engage in activities competitive with the business for which he is engaged, during a certain time after termination of his services. The statutes vary greatly. Some nullify any such restraint of trade. Others allow three months, a year, three years, or a reasonable time. What law governs, is controversial, but prevailing opinion seems to favor the law of the place or places where services have been rendered.\textsuperscript{97}

The exception of public policy, however, has rarely been used. Fry, J., did it with sweeping language in a well-known case of a French employment, but in this instance English law was the governing law.\textsuperscript{98} In one case, an express stipulation for the law of the state controlling the employing company was disregarded, on the ground of public policy, as "ineffectual to avoid the statute of California, the place of performance."\textsuperscript{99} A German decision extended the local restriction to a foreign contract of a German national in a foreign business place.\textsuperscript{100} These two solutions are plainly wrong. The first minimizes without justification the agreement of the parties on the applicable law, which would have satisfied even the theory requiring substantial connection therewith. A protective norm of California private law was treated as


\textit{Germany: A natural effect of the rule of lex loci solutionis.}

\textit{Italy: App. Genova (April 18, 1904) Riv. Dir. Com. 1904 II 361} (employment of a teacher in Switzerland by the Berlitz School of Milan; Italian law applied, against the prohibition of the Swiss \textit{lex loci contractus}).

\textsuperscript{98} \textit{Rousillon v. Rousillon (1886)} 14 Ch. D. 351, 369; \textit{see Cheshire 151}.

\textsuperscript{99} \textit{Davis v. Jointless Fire Brick Co. (C. C. A. 9th 1924)} 300 Fed. 1, 3.

\textsuperscript{100} \textit{Germany: OLG. Hamburg (April 6, 1907)} 72 Seuffert's Blätter für Rechtsanwendung 672, for employees of German nationality, strange, but approved by \textit{Nussbaum, D. IPR. 274 n. 1} and apparently by \textit{Lewald 244}. Another decision, \textit{OLG. Dresden (Jan. 25, 1907)} 14 ROLG. 345, forcibly introduces minimum terms for giving notice (HGB. § 67) into an English employment contract of a German employee; this has been criticized as going much too far even by \textit{Nussbaum, D. IPR. 274 n. 1}.
if it were a police regulation for the general welfare. The German case is typical for the unilateral “protection” of nationals, which easily may turn out to cause unfavorable discrimination against these nationals abroad.

On a broader plan, individuals are protected by modern private law against binding themselves by excessive obligations. The prototype of these provisions was the rule of the Code Napoléon that no one can engage his services but for a time or for a certain enterprise. 101 This fundamental law of emancipation from serfdom has justly been treated always as imperative also in conflicts law. 102 It is clear, however, that not the same exalted position belongs to the varying municipal rules determining in detail the time or place for which an individual may validly commit his services. 103

The same is true, for instance, in the case where an irrevocable and all-inclusive power of attorney, without valuable consideration and any proper interest of the agent, was executed in New York for exercise in Germany. The two laws differed in allowing remedies against exploitation of the principal, but either law, if governing the contract, was good enough. 104 It would have been different, if one of the laws involved had not provided any aid against thoughtless disposition by a person of all his assets; but there is scarcely such a law.

3. Immoral Transactions 105

Bribery. In 1880, the Supreme Court of the United

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101 C. C. art. 1780.
102 8 Laurent 243 § 169; Weiss, 4 Traité 376 and n. 4; 3 Fiore § 1119.
103 Rouast, Mélanges Fillet 210; Caleb, 5 Répert. 212 No. 53; more recently also Bartin, “Une conception nouvelle de la loi locale,” 52 Recueil (1935) II 583, 627, denies the application of ordre public to employments in foreign countries. To an opposite effect, 2 Frankenstein 336.
104 The problem is studied by Rabel, “Unwiderruflichkeit der Vollmacht,” 7 Z. ausl. PR. (1934) 797, 805, 807.
105 English cases are collected by Dicey 762-765; M. Wolff, Priv. Int. Law 180 § 172.
States^106 refused enforcement to the petition of the Turkish Consul General against the Winchester Arms Company for payment of a ten per cent commission unquestionably promised him by the firm. He had, by his influence, induced the purchasing agent of his government to accept the defendant's offer for very considerable deliveries. The Court took into account that the Turkish government at that time may have considered the behavior of the plaintiff, not paid for his work, as quite blameless; but the Court stated that the contract was corrupt.

"The services stipulated and rendered were prohibited by considerations of morality and policy which should prevail at all times and in all countries. . . . Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement."^107

The Court, in my respectful opinion, was right in deciding the case because the contract was made and to be performed in this country and gravely violated the American sense of propriety. The same reason explains why the Court, as it said, would always refuse enforcement to foreign contracts of such kind. But that "our laws" and "our policy" are as compulsory as "our morality," cannot be conceded.

*Lease of a gambling house.* In a well-justified contrast to the Italian decisions granting liberal enforcement to foreign valid gaming contracts, the Court of Cassation in Rome^108 refused enforcement to an Egyptian judgment by which the leaseholder of a gambling house was held obligated to pay the rent. The offense was not seen so much in the aleatory


^107 *Id.*, *supra* n. 106, at 271, 272 and 277.

character of the games as in the exploitation of dangerous human passions for egoistic purposes, as it was stressed that morality was violated. This reasoning is sound, if the refusal of the courts to deal with res turpes is ever considered sound.

D. CONCLUSIONS

Too great a margin has been left to the discretion of courts in disregarding the normal effects of conflicts rules. In this opinion, I feel encouraged by the results of Nutting. He suggests, however, a transfer from the courts to the legislatures of the selection of the domestic interests that are to be safeguarded from foreign encroachment. A similar proposal was made in 1910 by the Institute of International Law: Every lawmaker should determine with utmost care which of his provisions may never be replaced by foreign law. But do legislatures, in this respect, deserve more confidence than the majority of the judges who have learned to understand the necessary restrictions of local views? The evil could easily be aggravated by asking too many questions of the legislatures in each type of enactment.

The principle itself, rather, must be freed from its vague and all-inclusive character. Although no mechanical rule can shape the elusive exception of public policy, it may well be defined in a more reliable manner. Our results are as follows.

1. Conflicts rules delimiting the application of private law rules exist because the substantive rules of the various civilized jurisdictions are supposed to be exchangeable. This relationship should not be jeopardized at the forum by a pretended superiority of its own policies or legal techniques. The task of conflicts rules in the field of contracts is to determine to

109 Nutting, 19 Minn. L. Rev., supra n. 9, at 203, 209.
110 See Clunet 1910, 976. The same idea was expressed by Mr. Baron Parke in Egerton v. Earl Brownlow (1873) 4 H. L. Cas. 1, 122, to the effect that English judges should refrain from defining the public good.
what state a contract belongs. This done, no uncertainty arising from uncontrollable evaluations should be tolerated.

2. However, the rules of private international law are limited to a part of the entire legal system. They have no power over the rules of domestic public law, including all rules serving the interests of the state itself and the general welfare. These rules are, or should be, accompanied by their own territorial delimitations. In their domain, they enjoy at the forum unconditional precedence over private international law. There is no uncertainty about that. But the boundaries should and may very well be chosen, quite as for our ordinary conflicts rules, so as to include in principle only the contracts centered within the forum.

3. Foreign private law is applicable as it is, however it may be influenced by foreign public interests. There is no way of distinguishing the purposes of foreign enactments and no reason why we should recognize the validity of transactions repudiated by the law to which we ourselves subject them, or to invalidate transactions only because we do not agree with the purposes of the legislation competent under our conflicts rule.

4. The only general barriers to foreign law in the sphere of private international law, that may prove indispensable, arise from the depth of basic moral conceptions, which in our times naturally include those of fundamental social justice. Therefore, we may refuse unqualified enforcement to a foreign law allowing serfdom, legalizing contracts involving prostitution, or denying effectual relief to children or incompetent persons. Among civilized nations, we should not expect to find any considerable number of such abnormalities.

A step further, a court holding that in no case should a debtor be forced to utter ruin by the enforcement of a contract, may admit such defense, thus far unknown to American
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law, against an American contract. But the differences of views respecting overwhelming difficulty of performance caused by unfavorable circumstances no longer appear so widely separated as to warrant invocation of public policy.

Zitelmann contrasted good morals with offense to the internal law; likewise various modern laws literally restrict the application of public policy to cases where recognition of the foreign law would be inconsistent with public order and morality. The idea is sound, if only it were not dissolved into blue fog.

5. We may thus summarize:

Under Dicey's exception of public policy, a contract (whether illegal by its proper law or not) is invalid if it or its enforcement is opposed to English interests of state, to the policy of English law, or to the moral rules upheld by English law.

In the formulation advocated here, a contract valid by the law governing it, is nevertheless subject to the public law of the forum to the extent of proper territorial delimitation, and to deeply rooted and reasonable objections of good morals, including fundamental social justice.

6. What effect is due to a judgment refusing enforcement of a foreign-governed right on the ground of local public policy? The most common view in the conflicts laws of all countries takes it for granted that such a judgment has the full effect of res judicata. Occasionally other ideas have been expressed. Mr. Justice Brandeis, speaking for the Supreme Court

111 See BATIFFOL 404 § 487.
112 I am referring to a famous problem on which it suffices, for the present, to consult for American law, WILLISTON, 6 Contracts 5511 § 1963, and for comparative law, RABEL, i Das Recht des Warenkaufs § 45.
113 i ZITELMANN 334, 368.
Poland: Int. Priv. Law, art. 38.
114 DICEY 51 Rule 149.
of the United States, has asserted that, if a state declines to enforce a foreign cause of action, "it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere." The Court, of course, operated on the sole basis of the Full Faith and Credit Clause, and dealt with a special case of workmen's compensation. Even so, the dictum raises serious problems. But to transfer this solution into the sphere of conflicts law, as has been recently suggested by an eminent authority, would promote strange results. Evidently, if a court will deny enforcement without altering the possible cause of action, it can sometimes do so by refusing to take jurisdiction on the merits, in which case we should wish the court to pronounce expressly that it does not decide the merits. Our discussions on the applicable law, however, always presume that jurisdiction has been assumed. If so, a court should ordinarily enforce foreign rights, but if it does not, the common effects of taking cognizance must apply to the plaintiff. It would be rather dangerous to open an easy middle road for provincial minds.

II. VIOLATION OF FOREIGN LAW

The exception of public policy is generally understood to point exclusively to the public policy of the forum. A sharp contrast thereto is marked by the thesis of English judges that they would not assist or sanction agreements breaching the law of a friendly foreign country. It is a remarkable proposition, despite its vague form and rare application. Apart from the mistaken rule giving the law at the

115 Bradford Electric Light Co. v. Clapper (1932) 286 U. S. 145 at 160. The question has also been touched upon in International Harvester Co. of America v. McAdam (1910) 142 Wis. 114, 120, 124 N. W. 1042, 1044. 118 In addition to occasional dicta, recently this view has been taken by MORGAN, "Choice of Law Governing Proof," 58 Harv. L. Rev. (1944) 153 at 156, 157. 117 This desperate method of avoiding injustice has been mentioned but not applied in Precourt v. Driscoll (1931) 85 N. H. 280 at 283, 157 Atl. 525 at 527, cited by MORGAN, supra n. 116, at 190. 118 See the interesting opinion of STORY §§ 245, 255-257. 119 Supra p. 537 n. 69.
place of performance the power to invalidate the contract,\footnote{120 Supra pp. 538 f.} the most important case is one by which the English courts joined an international series of decisions against smuggling. We shall contemplate this interesting though isolated regard for foreign law.

**Smuggling.**\footnote{121 A good comparative monograph: \textsc{Messinesi}, La contrebande en droit international privé (Paris 1932).} Under an old inherited view, foreign revenue laws are refused enforcement.\footnote{122 State of Colorado v. Harbeck (1921) 232 N. Y. 71, 133 N. E. 357; \textsc{Lorenzen}, Cases 269; for English cases, see \textsc{Westlake} 291 § 213.} On this ground, English courts in the eighteenth century disregarded a Portuguese prohibition on export of gold\footnote{123 \textsc{Boucher} v. \textsc{Lawson} (1735) Hardw. 85, 89, 194, 195; dictum to the same effect by \textsc{Lord Mansfield} in \textsc{Holman} v. \textsc{Johnson} (1775) 1 Cowp. 341 in a tea-smuggling case.} and a French prohibition of assignats.\footnote{124 \textsc{Smith} v. \textsc{Marconnay} (1796) Peake Add. Cas. 81 N. P.; cf. 11 Eng. and Emp. Dig. 403.} In France, the Parlement d’Aix (1759) and the Court of Cassation (1835) held by the same approach that a contract contemplating the import of contraband into another country is not void, unless it includes corruption of the customs officers, clandestine measures (ruse) being immaterial.\footnote{125 \textsc{See Messinesi}, supra n. 121, at 17ff.; \textsc{Batiffol} 359 § 418; \textsc{Cass.} (req.) (August 25, 1835) S. 1835.1673 (secret importation of food into Spain).}

However, Pothier was the first, in the name of honesty, to protest against this indifference,\footnote{126 \textsc{See Oeuvres de Pothier}, 5 Traité du contrat d’assurances (1847) § 58.} and later many French and other writers followed him.\footnote{127 \textsc{United States}: 3 \textsc{Kent} 266; 2 \textsc{Wharton} 1139 § 484.} The German Supreme Court
developed a consistently strict practice, repudiating sales and agreements for carriage intended to infringe foreign customs laws or prohibitions on importing or exporting, for the protection of public welfare, such as, for instance, on importation of cocain into British India. The refusal included also loans to finance smuggling and sales of alcohol deliverable on the high seas near the territorial waters of Sweden and Finland. Three French appeal courts and that of Brussels shared in this doctrine, under which it is immaterial what law governs the contract.

Finally, the Court of Appeal of London joined this view in a decision of 1928, with a dissenting vote maintaining the old theory. By a contract governed by English law, whiskey was bought to be introduced into the United States during prohibition. The sales contract was declared unenforceable, by Lord Sankey with a reference to Dicey's rule respecting all prohibitions of the law of the place of performance, but by Lord Lawrence on the ground that the contract's recognition "would furnish a just cause for complaint by the U.S. Government against our Government . . . and would be contrary to our obligation of international comity, . . . and therefore would offend our notions of public morality."

The common basis of all these cases is the conviction that

128 Germany: RG. (Nov. 5, 1898) 42 RGZ. 295, 297; (Dec. 2, 1903) 56 RGZ. 179, 181; (Sept. 30, 1919) 96 RGZ. 282; and others.


129 RG. (June 24, 1927) JW. 1927, 2288, IPRspr. 1926/27 No. 15; cf. OLG. Stuttgart (Sept. 25, 1891) Clunet 1894, 896 (gold exportation from Russia).

130 RG. (March 10, 1927) JW. 1927, 2287, IPRspr. 1926/27 No. 17.

131 RG. (Oct. 26, 1928) IPRspr. 1928 No. 20.

132 France: App. Pau (July 2, 1886) Clunet 1887, 57 (affreightment); Trib. com. Douai (Nov. 11, 1907) S. 1907, 2, 308 (partnership for smuggling contraband into Belgium); App. Alger (Feb. 20, 1925) Clunet 1926, 701 (partnership for smuggling tobacco into Spain).


organized smuggling violates good morals and undermines the mores of the population along the frontiers. Many writers, therefore, have stressed the fact that the offense is to the forum's own public policy rather than to the foreign law. Nevertheless, Lord Lawrence's formulation, quite adequately, establishes as a basis respect for the foreign law under the forum's conception of public or, as it has often been put, of international morality.

This doctrine has encountered difficulties. Its most certain application is that where it is proved that both parties knowingly intended to circumvent a foreign prohibition on importation. On the other hand, an affreightment merely preparatory to smuggling has been held valid even in German courts. Moreover, the mere knowledge of the vendor that the buyer intends to use the goods for smuggling is not sufficient; the contract must involve a promotion of smuggling. Also contracts having the effect rather than the purpose of violating foreign law have been approved.

Between these two extremes, courts have enforced contracts, because of the lack of some aggravating element which they required for repudiating the bargain. Where a hotel manager of Maine acquired liquor in Massachusetts for resale prohibited in Maine, Mr. Justice Holmes, then a judge on the Massachusetts Supreme Court, recognized that it would be "barbarous isolation" for a state "to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbor's life." But, for the application of the foreign prohibition, he required a not too remote connection of the act of selling the liquor with the apprehended result, and in refusing the action for the price in the instant case, he did it on the assumption that the seller expected and desired the

134 RG. (Feb. 9, 1926) 69 Gruchot's Beiträge 78, IPRspr. 1926/27 No. 16.
135 KG. (Oct. 10, 1928) IPRspr. 1928 No. 21.
unlawful sale and intended to facilitate it. As a principle, Holmes found the sale void only when the illegal intent of the buyer is not only known to the seller but encouraged by the sale.\textsuperscript{136} This requirement has been taken as an expression of the widespread tendency of American courts to restrict the extraterritorial effect of statutes concerning intoxicating liquor, which were considered a disturbing element in commerce. But similar arguments were used abroad to validate contracts during the American era of prohibition. When a dock was leased in the Detroit River on the Windsor side for storing liquor, the Ontario court upheld the contract. One judge noted the absence of proof that by the lease the parties intended to commit a breach of the laws of the United States, a surmise not being sufficient, because the judge could not take judicial notice of the “alleged rum-running conditions in Windsor.” Another left the question open whether a conspiracy to infringe the American laws by importing liquor was existent, since whatever the plaintiff did in Canada, was legal and valid.\textsuperscript{137} Also the French Court of Cassation declared valid a contract of maritime insurance covering spirits, although the insurer admittedly knew very well that the purpose of the voyage was to bring the vessel near American territorial waters for transshipment. On this occasion, the Court did not formally reiterate the century-old thesis of the permissibility of clandestine smuggling, but thought that it was licit to vend alcohol on the high seas and that the sellers could not be sure of the intentions of the buyers.\textsuperscript{138} Maritime insurance in such cases is the more reprehensible, as it eliminates risk incurred by dishonest adventures.\textsuperscript{139} But strangely,

\textsuperscript{136} Graves v. Johnson (1892) 156 Mass. 211, 30 N. E. 818. Most cases concerning liquor sales are merely applying the law of the forum.


\textsuperscript{138} Cass. (req.) (March 28, 1928) S. 1928.1, 305. \textit{Niboiet}’s note \textit{ibid.} and in \textit{Gaz. Pal.} 1928.1, 812 points to the court’s denial of an international public policy, whereas \textit{Batiffol} 361 § 420 is somewhat encouraged by the hesitance of the Court.

\textsuperscript{139} See \textit{Niboiet}, \textit{supra n.} 138.
opinions are divided on this point. 140

Generalizations. Present American writers have adopted the view now prevailing and seem willing to generalize it to the effect that a contract should not be enforced, if it is made with a view of violating the laws of another country or at least of a sister state. 141 The English dicta mentioned before have the same tendency. They are in harmony with an old case which rejected a contract that aimed at supporting subversive activities. 142

A similar decision of the Tribunal de la Seine invalidating a loan governed by French law by which a revolution in Venezuela would have been supported, 143 inspired Niboyet to enlarge the doctrine disapproving of smuggling contracts. 144 He calls for a true "ordre public international," determinative of conflicts law in all countries, instead of for individual states. There has never been doubt about the desirability of mutual respect for legislation. But the slowness of development in this field has evident reasons. Probably, we have to be satisfied in the near future with a prudent expansion of the idea that violation of foreign law may be immoral.

International treaties. The normal way of securing international assistance for the purposes of a state is, of course, the conclusion of treaties. For example, the United States made eleven treaties to improve its opportunities for inspect-

140 United States: Cases for validity are cited by Williston, 6 Contracts 4953, 4954 n. 7.
The Netherlands: Condemning the insurance company, H. R. (Jan. 10, 1924) 8 Revue Dor 299.

141 See Williston, 6 Contracts 4950 § 1749.
143 Trib. civ. Seine (July 2, 1932) Flörshelm v. Delgado-Chalbaud, S. 1934, 73 at 75, Clunet 1933, 73; Revue Crit. 1934, 770; recommended for imitation, Note, 8 Tul. L. Rev. (1930) 283.
144 Note by Niboyet, S 1934, 73-75; Revue Crit. 1934, 772.
ing and arresting vessels suspected of carrying alcohol.\textsuperscript{145} Also a few multipartite conventions for the suppression of smuggling have been signed.\textsuperscript{146}

This suggests a final consideration. We have discussed the Brussels Convention sanctioning the Hague Rules and the satisfactory middle course achieved in dealing with liability of shipowners. Certain concessions have been suggested, recognizing prohibitions imposed by nonparticipant states on the inclusion of exemption clauses in bills of lading.\textsuperscript{147} It should be expected that also, vice versa, states remaining aloof from the multipartite treaty, nevertheless respect the Hague Rules as adopted in the port of dispatch. If they do not apply the law of this port as the law of the contract in general, still they ought to recognize the true international public policy embodied in a treaty of such merits.\textsuperscript{148}

\textsuperscript{145} MESSINESI, \textit{supra} n. 121, 60-64; DICKINSON, Revue Dr. Int. (Bruxelles 1926) 371.

\textsuperscript{146} Conventions for the suppression of contraband traffic in alcoholic liquor: of Brussels (July 2, 1890, art. 92, implemented June 8, 1899) 82 British and Foreign State Papers 55 at 76 and 91 id. 6; of St. Germain on the liquor traffic in Africa (Sept. 10, 1919) also ratified by the United States, 8 L. of N. Treaty Series 12, HUDSON, 1 Int. Legislation 352 No. 8; of Helsingfors (August 19, 1925) 42 L. of N. Treaty Series 73, and 45 \textit{id}. 183, HUDSON, 3 Int. Legislation 1673 No. 144 and 7 \textit{id}. 752 No. 484.

Pan-American Convention on the Repression of Smuggling, Buenos Aires (June 19, 1935) HUDSON, 7 Int. Legislation 100 No. 415.

\textsuperscript{147} \textit{Supra} Chapter 29, p. 428 and n. 139.

\textsuperscript{148} Correct international contract practice is illustrated by a bill of lading written in English for shipments from Antwerp whereby the jurisdiction of the courts of Hamburg is exclusively competent but the lawsuits are "to be delivered according to article 91" of the Belgian Maritime Code (Hague Rules). The Commercial Tribunal of Antwerp (Nov. 10, 1939) Jur. Port d'Anvers 1940, 225 has accepted this clause as valid, since the foreign court must be presumed to respect the Belgian public policy embodied in art. 91 \textit{cit}. 