CHAPTER 41

Employment and Agency

I. The Subject Matter

While voluntary authorization operates in the relation between the agent or, in common law, the principal, and the third party, the internal relationship between principal and agent rests upon a contract commonly termed contract of agency, although this word is also used differently. This includes, for instance, a contract of brokerage for buying securities, and excludes a sales contract made by a buyer intending a resale, or any other party contracting on his own account. To embrace, however, the contracts for a factual work, generally the word “employment” is added which really has no recognized legal meaning and overlaps the scope of agency; brokerage may also be called an employment. Although these two terms do not express a neat contrast, there is a distinction, important at least for conflicts law, between the two groups of contracts involved.

Common law has an appropriate and significant terminology: “Master and servant” is a broad old doctrine within the category of “principal and agent.” Its criterion is the superior choice, control, and direction, by the master, of the servant’s conduct and method in doing the work. In Europe,

1 35 Am. Jur. 448 § 5; 144 A. L. R. 740; 151 id. 1331.
2 This distinction was first suggested by 2 MEILI 80 to the extent that he advocated the law of the organization into which the employee integrates himself by his contract. The same result was recently proposed by 2 FRANKENSTEIN 335 (inconsistent with 333 ff.); 2 SCHNITZER (ed. 4) 711 ff.; BRESLAUER, 50 Jurid. Rev. (1938) at 293 (despite the vacillating English cases). No distinction has been made in the International Law Association, Vienna Draft 1926, 34th Report (1927) 509 ff.
the same outstanding type of contract has emerged more recently from ancient narrow and modern broad concepts.

In Romanistic tradition, *locatio conductio operarum* (*louage de service, Dienstmiete*), the hiring of services, was comparatively the most adequate analogue; the Institute of International Law spoke of conflicts rules for this type as late as 1927. But the full ground was covered only by the addition of *locatio conductio operis* (*Werkvertrag*), the contract for performing work, and numerous special kinds of contracts.

On the other hand, the modern term *Arbeitsvertrag, contrat de travail, or contratto di lavoro*, was sometimes extended to all types of contracts in which the obligation to work is outstanding. At present, however, this name is reserved for the contract concluded with dependent employees, industrial and agricultural as well as white collar workers, including even high-placed employees. This contract of work is to be defined as the private law contract whereby a person obligates himself to work with a certain continuity in the service and according to the directives of another person for a salary. It is unnecessary to restrict this concept to the accomplishment of material acts as contrasted with the conclusion of legal transactions.

The National-Socialist doctrine was eagerly at work to eradicate the very idea of this individual private contract of labor. But it has withstood totalitarian fanaticism.

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3 Annuaire 1927 III 219.
4 Germany: HUECK & NIPPERDEY (ed. 6) 104.
France: ROUAST in Planiol et Ripert, 11 Traité Pratique (ed. 2) 8 § 767; COLIN et CAPITANT (ed. 10) 745 § 1128.
Switzerland: OER-SCHOENENBERGER 1118 No. 9.
Brazil: CESARINO JUNIOR, 2 Direito social brasileiro (ed. 2, 1943) 132 § 228.
5 Thus ROUAST et DURAND, Précis de législation industrielle (ed. 3, 1948) 316 § 262 and 321 § 268, excluding the contract of "mandat."
6 At least these writers (SIEBERT, MANSFELD, etc.) tried to degrade the labor contract to an "auxiliary" position, see, e.g., RHODE, 3 Zeitschrift der
The thus established distinction of types is indeed of interest in conflicts law. In localizing the relations of an employer, there is a difference between his subordinates, bound to his business organization and instructions, and the professional persons lending him their services. Local connections have an overwhelming influence on the activity of independent contractors, while their importance in the other case is conditional and limited, although by no means insignificant. To anticipate the tendency of the most adequate decisions, we may observe that contracts of independent persons are governed by the law of their own domicil, and employment contracts with "servants" are governed by the law of that place of the principal's business to which the employee is attached. Usually, of course, servants live in the state where they are working, so as to make the laws of their domicil and of their working place identical. For this reason, the groups are often confused without any harm done. Moreover, the concept of servant in municipal law is for certain purposes sometimes reasonably extended beyond its usual scope. But for analytical purposes and for the practical needs of individual cases the distinction is needed.

Under this approach it is of minor significance that, in civil law, servants are supposed to make contracts as simple agents in the name of their principal, as for instance commercial clerks (German Handlungsgehilfe), whereas members of professions either act in their own name, such as the commercial "agents" (German Kommissionär) or, in appearing for their clients, exercise their own functions, such as attorneys.

Our productive materials for the conflict of laws regarding the employment of servants are scarce and are further

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Akademie für Deutsches Recht (1936) 371. A good survey on the discussion is given by Cesario, supra n. 4, 125 ff.

7 See infra n. 59.
diminished by the prevalence of workmen's compensation in the cases. This subject, for compelling reasons, requires special discussion. Only insofar as the law governing the employment contract is deemed to determine the question of indemnization for accidents may contributions be extracted from these cases.

II. MASTER AND SERVANT

1. Lex Loci Contractus

The law of the place of contracting has also been applied to employment contracts. This has remained the declared rule in Italy. The same rule obtained in the earliest English case on the subject, but other decisions reaching a seemingly similar result may be explained by additional local connections. The Dutch Supreme Court insisted on the rule in 1926 whenever the agreement fails to modify it. In Austria the more recent practice applies foreign law where


9 Foelix § 105; Despagnet § 300; Laurent § 454; Weiss, 4 Traité 374.

10 Italy: C. C. Disp. Prel. (1865) art. 9; C. Com. (1882) art. 58; C. C. Disp. Prel. (1942) art. 25 par. 1. Gemma, Dir. Int. del Lavoro 159 ff.; however, makes a meritorious attempt to apply the law of the place of performance on the ground of implied party agreement. Other Italian authors suggest the forcible application of Italian law to all cases where the place of employment is situated in Italy, whereas, in their opinion, the remaining cases are governed by the law applicable according to the rules of C. C. Disp. Prel. (1942) art. 25, par. 1; cf. authors cited by Gamillscheg 154-158 and Morelli (ed. 7) 154-156.

11 Arnott v. Redfern (1825) 2 Car. & P. 88, per Best, C. J.

12 The Netherlands: H. R. (Dec. 2, 1926) W. 11606, N. J. 1927, 321. The facts are left obscure in the reports, and the tendency to favor the lex fori is all too transparent, though the Dutch branch manager seems to be prejudiced thereby.
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the contract is made abroad with a foreigner. Before 1917, the Brazilian courts did the same where the principal was a foreigner.

It is scarcely necessary to mention again how often a decision asserts adherence to the lex loci contractus, while performance and all other fact elements point to the same result. This is particularly frequent in the United States. More remarkable, however, are decisions contrasting the law of the place of hiring with the law of domicil, as when a minor Irishman comes to Scotland and is there regarded as having capacity to be hired, because he is emancipated through independent establishment, "forisfamiliated," although not domiciled in Scotland.

Lex loci contractus is a convenient rule if both parties are domiciled in the same state where they make the contract. There is no reason why an intended foreign place of work should be material in such a case. When Italian parties contracted in Italy for service in the German branch of the firm, a German court correctly applied Italian law. It is farfetched to say that a French industrialist establishing a new factory in Africa and hiring personnel in France to

13 Austria: Allg. BGB. § 37; OGH. (Jan. 24, 1933) and (May 28, 1934) discussed by WAHLE, 10 Z. ausl. PR. (1936) 788, overruling the former decisions cited by NUSSBAUM, D. IPR. 272 n. 2 and BATIFFOL 268 n. 5.
14 Brazil: Sup. Trib. Fed. (June 23, 1896) Agr. No. 140, Jur. Sup. Trib. 1896, 67, OCTAVIO, Dicionário No. 266 against one dissident vote, which was followed in the C. C.
15 For this and other reasons, the long case lists in 2 BEALE 196 are insignificant.


take there, is contracting under an African law,18 or that a couple of American missionaries hiring a maid in the United States for their station in China, have Chinese law in mind.

By itself, *lex loci contractus* is an inept rule, despite Dicey19 and Beale.20

2. Law of the Master's Domicil

Where a contract is made outside the principal's residence or place of business, considerable authority has nevertheless selected the latter place for choice of law.21 This approach is wrong when the law of the place of the headquarters is applied to workers in foreign branches of a firm. But restricted to the cases where the servant is in fact attached to the central business place of his firm, the rule is excellent. It is corroborated in many instances by the comprehensive integration of modern employees into the particular business organization. Working conditions (whether determined by collective agreement or unilateral regulation), duties and benefits, discipline, hospitalization, and insurance, are in force for all affiliated persons without reference to the place where they sign the contract or where they live. Where no other local attachment is manifest, the main office of the firm is the natural center.

This localization of the employment relationship naturally also extends to:

(i) Employees occasionally or temporarily sent out by their employers to perform services in another country;22

18 Thus, Rouast in Mélanges Pillet at 203.
19 Dicey (ed. 5) 724 or (ed. 7) 873; as to the inconsistency of his exposition, see Breslauer, 50 Jurid. Rev. (1938) 282.
20 2 Beale 1192 f.; Restatement § 342.
21 Institute of Int. Law, 22 Annuaire (1908) 291, art. 2 (h).
England: Westlake 310 § 218.
France: Rolin, 3 Principes 418 § 1390.
Germany: OLG. Hamburg (Oct. 30, 1902) 6 ROLG. 5.
The Netherlands: Kosters 756; Mulder (ed. 2) 169.
22 United States: In the workmen's compensation cases, it has been often assumed that temporary work incidental to employment in a foreign state is no ground for the jurisdiction of the board. See Proper v. Polley (1932)
(ii) Traveling salesmen who have no fixed place of business in the country or countries visited by them. 23

The combination of the master’s domicil and the conclusion of the contract between present persons, e.g., when the future employee was invited there to negotiate the contract, has prompted several English decisions to apply the law of this place. 24 This also seems a sound solution. On the other hand, the appointment of a soliciting sales agent for Michigan by an Ohio corporation certainly should not be an Ohio contract simply because the contract is consummated there by approval of the corporation. 25

3. Law of the Servant’s Working Place

Prevailing opinion may at present be stated to the effect that where the servant is attached to a place of business

23 259 N. Y. 516, 182 N. E. 161; Darsch v. Thearle Duffield Fire Works Co. (1922) 77 Ind. App. 357, 133 N. E. 525. For details, see infra Ch. 42 pp. 224 ff.


France: ROUAST in Mélanges Pillet at 206.

Germany: R. Arb. G. (April 1, 1931) and (July 1, 1931) IPRspr. 1931, Nos. 53, 54 (dicta as to private law). See, for further references, GAMILLSCHEG 127 f.

Italy: GEMMA, Dir. Int. del Lavoro 162 f.

Switzerland: Ob. Ger. Zürich (June 22, 1933) 9 Z. ausl. PR. (1935) 710: activity in various countries with possible change of domicil according to the orders of a Swedish principal governed by Swedish law, though uncodified and not known to the German agents.


Oppenheimer v. Rosenthal [1937] 1 All E. R. 23: P, German corporation, A, manager of associated business in England, contract made in Germany. Younger, J., emphasized that the agent was directed and controlled by the firm.


25 This against Aultman, Miller & Co. v. Holder (C. C. E. D. Mich. 1895) 68 Fed. 467; actually the decision sought to avoid invalidity of the contract because the corporation had no license for doing business in Michigan.
different from the main office, the local law is applicable. Manifestly, this view complements rather than replaces the theory that the law of the principal’s place governs. The working place to which the employee is attached depends on the employer’s organization.

(a) **Domestic working place.** This approach has been preferred by many courts in favor of their own law. Sometimes they construct a “submission” of the principal to this law, sometimes it is claimed that private and public labor laws are interrelated and must be given territorial force. Such a rule, technically based either on *lex loci solutionis* or on public policy, in deviation from the regular test of the court, was applied in older Austrian decisions, 26 in Brazil under the Introductory Law of 1917, 27 often in Italy, 28 and occasionally elsewhere.

(b) **Domestic or foreign working place.** We may, however, at present presume that in most countries the rule

26 OGH. (June 1, 1929) and others, see WAHLE, 10 Z.ausl.PR. (1936) 788.
27 Brazil, on the general rule of Introd. Law of 1916, art. 13 I, cf. OCTAVIO, Dicionário No. 266 at the end.
28 E.g., App. Genoa (April 18, 1904) Riv. Dir. Com. 1904 II 361: P, Berlitz school in Milan, A, Swiss in Switzerland where contract was made for teaching in Milan, Italian law applied restraining the teacher’s activity after termination; Cass. (July 28, 1934) Foro Ital. 1934 I 824, Rivista 1934, 557: Belgian company employs an Italian, contract made in Belgium, work in Italy, Italian law prevails and invalidates the clause for Belgian arbitration. Against the latter conclusion, BALDONI, Rivista 1934, 566: at present the place of business decides, not the place of contracting.


The Netherlands: Trib. Amsterdam (April 7, 1932) N. J. 1932, 1541, 11 Z.ausl.PR. (1937) 203 No. 31: P, stock company domiciled in Amsterdam and carrying on a branch in Netherlands India, A, Dutchman to serve there, Netherlands-Indian law; App. Amsterdam (May 16, 1935) N. J. 1935, 1335, 11 Z.ausl.PR. (1937) 229 No. 133: P, shipowner in Netherlands India, A, to serve on ships based there, Netherlands-Indian law prohibiting attachment of the wages (apparently the principle of the place of work rather than that of the flag is invoked). MEIJERS, N. J. 1927, 323, Note: commonly the place where the work is to be performed is assumed (to decide). Further cases are cited by GAMILLSCHEG 165 ff.

Germany: GAMILLSCHEG 125 ff.; and BAG. (May 9, 1959) NJW. 1959, 1702; BAG. (May 13, 1959) 7 BAGE. 362.
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is bilateral. Even when the place of work is not within the country, the law of the employer's business place to which an employee or worker is permanently assigned as a matter of organization, governs his relations with his employer. This is true for the foreign systems.\(^{29}\) The same rule has been claimed with respect to the United States,\(^{30}\) and is supported, if not by an impressive array of decisions, at least by a promising trend.\(^{31}\)


France: Theory advocated by ROUAST in Mélanges Pillet at 205; CALEB, 5 Rép. 215 and BATIFFOL 270, who, however, states only two decisions not concerning workmen's compensation; of these claims, Cour Paris (Jan. 12, 1900) Clunet 1900, 560, favored "implicit" adoption of lex loci solutionis, whereas Cour Pau (Feb. 28, 1922) Clunet 1922, 406 would not deal with a true conflict of laws. In a recent case the French Court of Cassation affirmed the decision of a Court of Appeals, which had ruled that employment contracts are normally governed by the law of the working place; see Cass. civ. (Nov. 9, 1959) Revue Crit. 1960, 566 note SIMON-DEPITRE. Another French court applied the law of Vietnam to a French citizen's employment contract to be performed in that country; see Trib. Seine (June 1, 1960) Revue Crit. 1961, 198 note SIMON-DEPITRE.


Switzerland: BG. (Oct. 21, 1941) 67 BGE. II 179 speaking of the activity of the agent as primary whence it is concluded that the court generally applies the law of the working place, see 2 SCHNITZER (ed. 4) 712-714, cf. infra n. 63 on 60 BGE. II 322. BG. (Dec. 22, 1916) 42 BGE. II 650: branch manager.

\(^{30}\) BATIFFOL 266, as law of the place of performance; Restatement (Second), Tent. Draft No. 6 (1960) § 346 l.

\(^{31}\) United States: Garnes v. Frazier & Foster (Ky. 1909) 118 S. W. 998 (statute of frauds); Denihan v. Finn-Iffland (1932) 143 Misc. 525, 256 N. Y. Supp. 801 (damages for unjustified discharge; contract held to be concluded in Pennsylvania, but subject to New York law as the place of performance);
4. Special Rules

(a) Cases actually applying the national law common to the parties are isolated. Employment contracts have much more important local connections which overshadow this nationalistic criterion.

(b) Contracts of employment made by the state or other public entities for public constructions have often been said to depend on the law of the seat of the principal. This rule would better be reduced to the meaning of the general rule stated above.

(c) Briefly it may be noted that the contracts by which master and crew of a seagoing vessel are hired, as a rule, are commonly governed by the law of the flag.
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5. Public Law and Public Policy

(a) Public law. In cardinal points, legal protection for workers has been beneficially unified under the conventions promoted by the International Labor Office. For the remaining differences, agreement seems to exist that the state policy over industrial, commercial, and agricultural labor as expressed in the compendious modern administrative law, has territorial force, prevailing over private law and excluding private international law. On the other hand, the public law is territorially restricted. It extends to working places within the jurisdiction and those occupations on foreign soil which have been termed radiations from a domestic center by the German Supreme Labor Court.

Thus, where an engineer is sent by his employer, a machine manufacturer, to install a machine sold to a foreign country, or employees live in a neighboring town beyond the state border, laws concerning unemployment or social insurance may extend to them. But when groups of German enterprises were organized in order to carry on important works

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England: Merchant Shipping Act, 1894, s. 265 (subsidiarily).
France: Code du Travail Maritime (Law of Dec. 13, 1926) art. 5, with exceptions, see VERNEAUX, 8 Répert. 529 ns. 22-25.
Italy: Disp. Prel. C. Navig. art. 9 (if the flag is not Italian, the law may be chosen differently by the parties).
The Netherlands: Rb. Rotterdam (Feb. 1, 1932) W. 12533, I VAN HASSELT 419 (preferring the English place of the principal to the Dutch place where the seaman was enlisted in the ship’s crew).
For further references, see GAMILLSCHEG 177-179.
In Air Line Stewards Ass’n v. Northwest Airlines, Inc. (C. C. A. 8th 1959) 267 F. (2d) 170 it was held that the law-of-the-flag doctrine does not justify the extension of the Railway Labor Act to employees of an American air carrier working completely outside the United States, because Congress did not intend to give extraterritorial effect to the act.

36 See Vol. II Ch. 33.
36a The term "Ausstrahlung" (radiation) has been adopted and analyzed by German legal writers: GAMILLSCHEG 180-182.
37 Swiss BG. (March 4, 1892) 18 BGE. 354.
in France, for reparations after the First World War, the German laws on labor representation and the hiring of disabled war veterans were held inapplicable, although the employment contracts were presumably governed by German law.\(^{38}\)

It has been held, on the same theory, in Austria, that the law regulating the legal situation of commercial servants is inapplicable to the employees of foreign enterprises,\(^{39}\) and in Greece that the right of a worker injured abroad to compensation under the foreign law does not concern international public policy.\(^{40}\)

(b) **Collective labor agreements.** Labor contracts, negotiated in collective bargaining between employers and labor unions, in the common opinion, are effective in the district in which the employer's working establishment is physically situated. The state in which this place is, determines all particulars.\(^{41}\) But insofar as these contracts pertain to private law, it is recognized that they may be extended through agreement of the parties to foreign-located branches.\(^{42}\) And the elements of private law contained in the standard agreements on working and wage rules incorporated into the individual labor contracts,—which have been correctly described in this country as third party beneficiary agreements, subject to the conventional law of contracts,\(^{43}\)—may be expected to be enforced in courts of other states.

(c) **Public policy.** Less well settled, however, is the ex-

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\(^{38}\) Supreme Labor Court (April 1, 1931) and (July 1, 1931) IPRspr. 1931 Nos. 53, 54.

\(^{39}\) OGH. (May 28, 1934) cited by WAHLE, 10 Z.ausi.PR. (1936) 788.

\(^{40}\) Aeropag (1932) No. 131, 43 Themis 449.

\(^{41}\) 2 HUECK & NIPPERDEY (ed. 6) 359; BALDONI, "Il contratto di lavoro nel diritto internazionale privato italiano," in 24 Rivista (1932) 346, 362; GAMILLSCHEG 360 ff.

\(^{42}\) 2 HUECK & NIPPERDEY (ed. 6) 360; cf. C. GREGORY, Labor and the Law (1946) 385.

tent to which the private law of the forum should intrude into a private employment contract governed by foreign law. The domestic private law in question includes the termination of employment by dismissal and the compensation in case of unwarranted or premature dismissal, restraint of trade on a former employee, duties of preserving the health and morals of servants, and presumably laws prescribing place, time, and means of wage payments. The territorial character of all provisions on such matters is often in the mind of writers. If the work is to be done in the forum, the domestic law would thus necessarily be applied.

In the most appropriate view, however, provisions of public labor law for the protection of employees are, of course, compulsory for the working conditions within the territory, but private interests safeguarded by protective provisions of local private law do not include relations governed by foreign law. The distinction is emphasized by the fact that public interests merely create duties of the employer towards the state, without giving the employee a cause of action, whilst contractual rights are enforceable against the other party.

It is true that modern consideration for the worker has in part breached these confines. Private duties towards the employee may duplicate the public duties towards the state; public social protection may influence, directly or by con-

45 See for France, Rouast in Mélanges Pillet at 211 ff. (with exceptions); Caleb, 5 Répert. 210 ff. (characterizing some of these problems as tort); following this lead, App. Bruxelles (Nov. 26, 1938) Pasicrisie 1940 II 92, Journ. des Trib. 1940, c. 87, even though the contract is made in Belgium between Belgian nationals, prescribes territorial application of the law of the foreign working place protecting the employees as to “paid furlough, form and effects of notice and discharge.” Distinctions have been made by Gemma, Dir. Int. del Lavoro 161 ff.
46 This view has been developed against many other theories by Kaskel, see Kaskel-Dersch, Arbeitsrecht 258, and advocated by Hueck & Nipperdey (ed. 6) 125 ff.
struction, the contractual relationship. All this has been observed in Europe,\textsuperscript{47} and exactly the same development is occurring at present in the United States.

Thus, the Fair Labor Standards Act expressly prescribes an action for the employee against the employer.\textsuperscript{48}

The New York Labor Law only provides that the wages to be paid upon public works “shall be not less than the prevailing rate of wages,”\textsuperscript{49} and the Appellate Division, accepting the correct principle, specifically found that the Labor Law gave an exclusive remedy to be exercised only by the fiscal officer.\textsuperscript{50} The Court of Appeals, however, held that a laborer could enforce the provisions of the statute by common law action since they must be inserted in the contract.\textsuperscript{51}

III. INDEPENDENT AGENTS

1. Rule

More or less definitely, a part of the literature\textsuperscript{52} and the bulk of court decisions in many countries have decided that contracts made with attorneys, solicitors, physicians, or other persons exercising a public profession, as well as

\textsuperscript{47} I Hueck & Nipperdey (ed. 6) 125 ff.; Gamillscheg 185 ff.


\textsuperscript{49} § 220 subd. 3, Cons. Laws, Book 30; cf. subd. 5 (c) and 7 on the enforcement by the fiscal officer.

\textsuperscript{50} Fata v. Healy Co. (1941) 263 App. Div. 725, 726.

\textsuperscript{51} Fata v. Healy Co. (1943) 289 N. Y. 401, 405, 46 N. E. (2d) 339: “It cannot be doubted that provisions requiring the contractor to pay such wages are also inserted in the contract, whether voluntarily or under compulsion of the public body which is a party to the contract.” (Note that this does not mean public interest in every labor contract.) Cf. Lenhoff, “Optional Terms (\textit{Jus Dispositivum}) and Required Terms (\textit{Jus Cogens}) in the Law of Contracts,” 45 Mich. L. Rev. (1946) 39, 75.

commercial orders to commission agents, factors, brokers, or any merchants acting in the interest of the principal, are governed by the law of the state where these persons have their permanent place of business. It has rightly been argued that no one can expect such persons, sought out at their domicil, to change their conditions according to the nationality or domicil of the client or customer; they exercise functions within the social and cultural framework of their state; they are under legal rules and professional organizations governing a substantial part of their activity.

It should be regarded as immaterial in this connection whether the acting person discloses his principal or not and whether his order is given from case to case or is a standing assignment.

In opposition to this view, lex loci contractus retains a role in Italy and probably other Latin countries. Also Beale and the Restatement have turned the meaning of the cases to the stereotyped rule of the law of the place of contracting.\(^53\) These are undesirable remainders.

2. Public Professions\(^54\)

(a) Attorneys. The English Privy Council once decided a case where the plaintiff, an attorney of Quebec, was appointed to represent the British Government in an international commission between Canada and the United States on the payment for fishing rights. The contract with the attorney was perhaps made in Ottawa, Ontario, and the meetings were held in Halifax, Nova Scotia. The Canadian

\(^53\) Restatement § 342; 2 Beale 1192 § 342.1; Ital. Disp. Prel. C. C. (1942) art. 25; 7 Laurent § 454; Despagnet 635. Contrary to the First Restatement, the Restatement (Second), Tent. Draft No. 6 (1960) § 346 l is in agreement with the view here suggested; see Illustrations 6 and 7, id. at 145 f. For criticism, see Ehrenzweig, Conflict 529.

\(^54\) Inst. of Int. Law, 22 Annuaire (1908) 291, art. 2 (g).

Poland: Int. Priv. Law, art. 8 (6): notaries, attorneys, and other persons exercising a public profession; Westlake § 218: barristers. The Polish Draft 1961, art. 15, does not contain this, or a similar, provision.
courts and the Privy Council, however, selected the law of Quebec for determining the fees due to the plaintiff because this was the state where he normally exercised his professional functions.\textsuperscript{55} The same view is held in other countries,\textsuperscript{56} and is probably in the mind of American courts.\textsuperscript{57}

(b) **Physicians.** Cases are scarce,\textsuperscript{58} but no opinion opposing the above view is known.

3. Commercial Agents

(a) **Permanent agents.** This term may indicate independent merchants who place their activities at the service of a firm, either as exclusive distributors in an assigned territory or to administer buildings, buy or sell in continuous relationship, solicit orders, or cash money. The delimitation of these types from the field of master and servant is sometimes difficult to state. Wise courts have extended by analogy

\textsuperscript{55} Regina v. Doutre (1884) 51 L. T. R. 669, Clunet 1886, 116—P. C.

\textsuperscript{56} Austria: OGH. (Jan. 17, 1928) JW. 1929, 160.

Germany: RG. (Oct. 25, 1935) 149 RGZ. 121: German attorney, as executor of will acting in the United States, fees according to the law of his legal domicil; RG. (March 20, 1936) 151 RGZ. 193: Austrian attorney for German party, "the law in force at the professional domicil governs the relations between the attorney and his client," Austrian law; BGH. (Nov. 15, 1956) 22 BGHZ. 162: American attorney for German party, fees being validly agreed upon according to the law of his place of business not violating German public policy.

Greece: 2 Street-Vallindas 229 n. 7.

Switzerland: App. Bern (April 7, 1933) 8 Z. ausl. PR. (1934) 826 (Yugoslav law).


\textsuperscript{57} Roe v. Sears, Roebuck & Co. (C. C. A. 7th 1943) 132 F. (2d) 829 (limitation of action) is not strict evidence since everything happened in Illinois.

In Lust v. Atchinson etc. R. Co. (1932) 267 Ill. App. 60 it was held that the law of the place (San Francisco) where the attorney entered into his contract with his client determined whether the attorney has a lien for the costs of the suit against the defeated adversary. But evidently this decision was supported by the facts that the attorney was domiciled in San Francisco and the judgment was rendered there.


\textsuperscript{58} Germany: OLG. München (June 11, 1926) 75 Seuff. Arch. 313 No. 129.

In addition, see Ehrenzweig, Conflict 532.
legal provisions literally restricted to commercial servants so as to comprehend certain groups of merchants.\textsuperscript{59} Therefore, conflicts rules should not necessarily require a radical distinction of functions.

In the United States, the clear tendency to apply the law of the agent’s domicil has been concealed under the cover of \textit{lex loci contractus}.

\textit{Illustration.} The Transit Bus Sales Company, a resident of Wisconsin, obtained by written contract exclusive distribution of interurban busses manufactured by Kalamazoo Coaches, Inc., in the territory of “a number of states,” including Wisconsin and Upper Michigan. The court after much argument about the doubtful “place of contracting” construed it as being in Wisconsin.\textsuperscript{60} The sales territory,

\textsuperscript{59} For example, in the United States where a truck driver uses his own vehicle to transport goods of another, courts have allowed common law action for injury or death, or applied statutes on workmen’s compensation, social security, and unemployment compensation. Cf. Note, 144 A. L. R. 735, 740, but see 151 A. L. R. 1331.

In Germany, the case of independent contractors employed similarly to servants (Arbeitnehmerähnliche Agenten) has been much discussed, see HUECK in 39 Riv. Dir. Com. (1941) I 143 at 145; \textit{Hueck} & \textit{Nipperdey} (ed. 6) 52 f.

A nice example, for our purposes, is furnished in a German case, RG. (Jan. 8, 1929) JW. 1929, 1291. A German firm appointed a firm in New York as exclusive general agent for distributing its goods in the United States and Canada. The goods, however, were to be bought by the American party as buyer and resold by it within its territory. In the words of the annotator, \textit{Titzte}, the New Yorker is not an “agent” (in the German sense) since he sells in his own name; he is not a commercial employee, since he sells in carrying on his own business; and he is not a commission agent since he distributes on his own account. The court finds a relationship similar to “agency” as justification for applying by analogy the limitations on dismissal by the principal, prescribed for agency in § 92 of the Commercial Code. Of course, the court should not have applied German law at all, much less without a word of justification, \textit{cf.} IPRspr. 1929 No. 34.

\textsuperscript{60} Transit Bus Sales v. Kalamazoo Coaches, Inc. (C. C. A. 6th 1944) 145 F. (2d) 804; Alexander v. Barker (1902) 64 Kan. 396, 401, 67 Pac. 829 directly applied the law of Cherokee, the place of activity and performance, to the validity of the contract of agency.

In Gaston, Williams & Wigmore of Canada, Ltd. v. Warner (C. C. A. 2d 1921) 272 Fed. 56, the broker employed for the sale of a ship was domiciled in New York where the brokerage contract was made and the vessel was to be delivered. It was held immaterial to the earning of the fee, on the ground of the law of New York, that both parties to the sale were British subjects and hence the sale, in wartime, was void.
of course, afforded no clue since the states of both parties are included. The decision in favor of Wisconsin law could have been very simple, on the ground of the place of business of the sales agent. 61

In another recent case of a contract, combining sales and agency, exactly the same result has been based upon the law of the place of performance. 62

In a long chain of decisions, German and Swiss courts have developed the constant doctrine that the law of that place governs where "the agent deploys his activity," meaning the fixed domicil where the agent is established and from which he is active in the interest of the principal. 63

(b) Brokers and occasional agents. We distinguish this

61 This theory should have been followed in Smith v. Compania Litogr. de la Habana (1926) 127 Misc. 508, 217 N. Y. Supp. 39. The plaintiff was to represent the defendant company of Cuba in the United States and Canada, and made the contract inter praesentes in Cuba. The court referred to the law of Cuba as mere lex loci contractus, which is insufficient, and as supplanting lex loci solutionis, because the agent had to work in several countries (a known, inappropriate approach). Finally, the Cuban law not being in evidence, the lex fori was applied. The agent probably had a domicil in the United States from which he traveled; the decision does not state the contrary. Even so, he lived and worked in North America. This fact surely supports the application of some American law—though not the lex fori—in preference to the labyrinthian solution of the court.


63 Germany: RG. (Oct. 11, 1893) JW. 1893, 549 (rights of agent after notice); 38 RGZ. 194, 51 id. 149; JW. 1899, 146 No. 21; OLG. Kolmar (March 27, 1896) 8 Z.int.R. (1898) 45, Clunet 1903, 886 (agent for buying flour in Paris, French law); OLG. Hamburg (June 26, 1909) 21 ROLG. 385 (English agent for exclusive distribution for Great Britain and colonies, English law of restraint of trade); OLG. München (March 8, 1956) IPRspr. 1956/57 No. 46 (Italian with domicil in Munich acts as agent for an Italian firm, German law).

Otherwise, RG. (Oct. 28, 1932) 138 RGZ. 252 (on the ground of express agreement for the German law of the principal). RG. (Jan. 8, 1929) JW. 1929, 1291 (without justification and much criticized). BGH. (March 19, 1956) IPRspr. 1956/57 No. 23 (agreement for German law implied in statements by counsels in court).

Switzerland: BG. (Sept. 18, 1934) 60 BGE. II 322 (French general agent for France and the French colonies, French law). BG. (Oct. 25, 1939) 65 BGE. II 168 (as a rule, law of the place where the exclusive representative deploys his activity). For many other cases, see KNAPP, 60 Z. Schweiz. R. (N. F.) (1941) 335 (a) No. 40. A Swiss law of Feb. 4, 1949, by express provision, governs all contracts of permanent agents, insofar as the agent's "field of activity" (Tätigkeitgebiet) is Switzerland, regardless where his place of business is situated. See LITTMANN, Die kollisionsrechtliche Bedeutung
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Group for the one reason that certain doubts have arisen with regard to stockbrokers. Apart from some old decisions which do not even consider the conflict of laws, there is no controversy with respect to factors and to selling or buying agents contracting in their own name on orders. Certainly the domicil of the principal and the place where the order is given are without importance, although both have been favored by some theoreticians. Thus, where a

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Austria: OGH. (July 9, 1937) Zentralblatt 1937, 748 No. 433, where the agent is a merchant registered and domiciled in Austria, Austrian law applies.

Hungary: Curia P. VII 3813 (1931), Szászy, 11 Z. Ausl. PR. (1937) 172 No. 1: a Hungarian firm granted an American firm exclusive distribution of certain skins in the United States and Canada; the agent gave notice and demands damages because the principal made a direct offer to another American firm. The court recognizes American law as governing, but under a sort of natural law, it charges the American plaintiff with lack of good faith because he failed to warn the defendant of the rigidity of American law.

Thus, Adams v. Thayer (1931) 85 N. H. 177, 155 Atl. 687, the principal lived in New Hampshire, the contract was centered in Massachusetts.

Berry v. Chase (C. C. A. 6th 1906) 146 Fed. 625. French courts do not really apply in this case the lex loci contractus, see Batiffol 287 n. 3.

The place where the order is given appears as late as in the proposals of Pillet to the Institute of International Law, 23 Annuaire (1910) 283, 291, and in Amieux's article, 2 Répert. 440 f. n. 17, although he conceives that this place is difficult to determine.

Similarly the I. L. A., Copenhagen Draft of 1950, see supra Ch. 40 n. 67b, in certain cases favors the law of the place where the authority has been given (art. 4); and the Lucerne Draft of 1952, see supra Ch. 40 n. 67c, declares applicable the law of the place of business (établissement) "through the intermediary of which the authorization is given" or received, respectively (art. 4).

To the same effect Gutzwiller, 43 Annuaire (1950) 74, 86 ff. and probably Restatement (Second), Tent. Draft No. 6 (1960) § 346m par. (1). The new Restatement subjects contracts with stock brokers to the law of the exchange, if the contract "is entered into by a broker in the state where the exchange is situated." This rule apparently refers to the place where the broker makes the contract rather than to his place of business and is therefore along the lines of the proposals mentioned before.
grain broker in Chicago is ordered to buy or sell grain on the Chicago Board of Trade Exchange or a stockbroker in New York is ordered to transfer securities on the New York Stock Exchange, the local law of the broker and the exchange governs the entire contract, including validity, performance, and effects of wrong performance by either party. However, complications do exist.

The American practice has become fairly firm in applying this rule to the question whether the contract is invalid as gambling or wager. The contract is even enforced in the states where it would be invalid under domestic law, the few exceptions probably being obsolete. However, this concerns the relation of the states to federal institutions for the common benefit. Would the rule be applied to foreign exchanges as well? We have seen a more restrictive practice in European courts.

All these propositions, which make the place where the contract or part of the contract is made a decisive criterion, meet with the very same criticism that has been pointed out regarding art. 3 (2) of the Hague Convention 1955; see supra Ch. 36 n. 28b and text.

68 France: Trib. com. Seine (July 4, 1894) Clunet 1894, 994 (London broker); and many subsequent decisions, see BATIFFOL 287 n. 3; adde Paris (March 7, 1938) Clunet 1938, 739.


Germany: RG. (May 10, 1884) 12 RGZ. 34, 36; (April 1, 1896) 37 RGZ. 266 (although the instant contract was invalidated by public policy); RG. (June 18, 1887) 4 Bolze No. 26, according to NUSSBAUM, D. IPR. 276 n. 2 denies the right of the English broker to intervene as a party according to English law.

Italy: Cass. Napoli (Sept. 18, 1914) Clunet 1915, 703, and many other decisions, the "absolutely prevailing opinion" according to CAVAGLIERI, Dir. Int. Com. 425 n. 1.


71 MEYER, id. 677 n. 4.

72 Vol. II (ed. 2) pp. 569 ff. The criticism there expressed is supported by STOLL, supra n. 68a, at 634 ff.
A difficulty arises where the broker's place differs from the location of the exchange. Of course, it is commonly realized that the parties reasonably contemplate the rules of the exchange at which the order is intended to be executed.\textsuperscript{73} American courts, furthermore, have conveniently applied the rules of an exchange not determined by the parties but at which the contract would be customarily executed.\textsuperscript{74} In connection with this view, the legality of the operation always depends on the law of the state of the exchange and not of the place where the order was given or received, thus excluding the law of the broker's domicil.\textsuperscript{75} Sometimes, a direct correspondence between the client and the substitute of his local broker, at the seat of the exchange, has facilitated the decision that the entire contract was governed by the law of the exchange.\textsuperscript{76}

Nevertheless, in numerous respects there remains room

\textsuperscript{73} E.g., Winslow v. Kaiser (1934) 313 Pa. 577, 170 Atl. 135. The defendant client "was visited with knowledge of the board's rules which allowed the matching of orders to buy and orders to sell."


Germany: \textit{Infra} n. 79.

Switzerland: See Vol. II Ch. 28.

\textsuperscript{74} Berry v. Chase (C. C. A. 6th 1906) 146 Fed. 625, 629. The Restatement (Second), Tent. Draft No. 6 (1960) § 346m par. (2) (a) only takes into account the case in which the customer knows the exchange where the transaction is to be made. Even in this case, the application of the law of the exchange has been criticized at the 37th Annual Meeting of the American Law Institute; see Proceedings 563-566.


Germany: To reach the same result, the Reichsgericht goes so far as to apply the law of the exchange as the general law of the contract, see \textit{supra} n. 72 and BRÄNDL, Int. Börsenprivatrecht 94.

France: The courts emphasizing generally the determination of legality by the law of the exchange, e.g., Trib. sup. Colmar (Jan. 17, 1923) Clunet 1924, 1049 and Note, NAST, might decide likewise where the broker is established elsewhere. It is true that the frequent detour of decision through construing the place where the commission agent receives the order as place of contracting might mislead in this case.

\textsuperscript{76} Hoyt v. Wickham, \textit{supra} n. 75. In Mullinix v. Hubbard (C. C. A. 8th 1925) 6 F. (2d) 109, 114 the order was given in Memphis to a local branch
for the broker's law. Some decisions have ignored the problem, and some have directly referred to the law of the exchange, although the operation is made through a local broker with the aid of a subagent. On the other hand, in what appears to be the best considered decision, the Massachusetts court states that, as in the absence of specification the order was executed in New York, it was only "in certain respects subject to the rules and regulations of the New York Stock Exchange," but not "to be governed by the laws of that state relating to stock bought on margins."77

This question was determined under the law of Massachusetts, considered as the law of the place of contract; we ought to add that payment and delivery were due there, and more important yet, the broker was domiciled there.

As a Quebec decision justly asserts, advances made by a broker in buying and selling at an exchange are to be recovered under the law governing the contract with the client, and not by the law of the place where the buying and selling took place.78

The German Reichsgericht, to the contrary, prefers the law of the exchange as a whole79 to that of the broker. But this is just another consequence of overemphasizing the lex loci solutionis. Prevailing German literature is in opposition.80

of the New York stockholders; hence no further question of localization occurred.


78 Finlayson v. Kell (1921) 23 Que. Pr. 328.

79 RG. (Nov. 30, 1899) JW. 1900, 19 No. 32; (Nov. 21, 1910) JW. 1011, 148 (German broker ordered to sell securities in the United States, American limitation of action); contra: Lehmann in 5 Düringer-Hachenburg II 676. RG. (May 30, 1923) 107 RGZ. 36, see infra n. 80.

France: Similarly, the editor of Clunet in Notes, e.g., Clunet 1938, 742, 745, speaking of the law of the exchange as "professional law."

80 This is the main point of controversy between German writers and the
The law of the broker’s place of business, hence, should govern such problems as free consent and capacity of the parties, time and place of payment and of delivery to the customer, remedies for nonperformance by the broker, and his duty to account. Where the broker under his own law, e.g., German, is entitled to take up the ordered transaction in lieu of a third party, he may do so despite the contrary law of the state, e.g., England, where the exchange is situated in which the order would otherwise be carried out. But of course this question is decided under the usages of the exchange in the case where the order is performed by a subagent. On the other hand, if the customer fails to provide cover according to the contract, the broker is entitled to sell out by any method recognized at the exchange.

(c) Real-estate broker. When a real estate broker is domiciled at the situs of the immovable, this fact determines the applicable law without regard to the place where the brokerage agreement is made or a purchaser is found. The Georgia court, so reasoning, decided to apply the lex loci solutionis, but this, too, is not the adequate rule. The broker sues for his fees, which he earns when he presents a buyer able and willing; this may occur at any place. If the broker resides outside the state of situs, an Illinois decision has applied the Louisiana law of the situs on the ground that the agreement was made there. This, however, hap-
pened only by accident, as the activity of the broker was centered in Illinois where he also found a purchaser. *Lex loci contractus* in this case, as *lex loci solutionis* in the first case, is beside the point. The *lex situs* has simply scored another undeserved victory.

Even more questionable are other decisions invalidating the brokerage and depriving the broker of his fees on the ground of his lack of license. While understandably the law of the situs upholds its public policy with respect to its land, an Illinois court decided against a broker, licensed in Illinois, who found a purchaser for Illinois land in New York, where he was not licensed, and in New York a broker's suit was dismissed because he was not licensed to deal in Pennsylvania land.

Consistently, the contract ought to be centered at the domicil of the broker. The broker, then, should be required to be licensed at his domicil, and the situs may void his claim if he is not licensed there, although even this, once more, unduly disturbs the private law in the interest of administrative interstate diversity.

4. Public Policy

Under the French law, the promise of an exaggerated fee to any agent, including solicitors, barristers, notaries, architects, and enforcement agencies, may be reduced by the court. It has been correctly argued that the law of the contract rather than the French territorial law should apply.