CHAPTER 46

Insurance

I. AMERICAN LAW*

The question of the law governing insurance contracts in the United States recurs in three different spheres. The state courts determine the private law applicable to insurance contracts, allegedly under the ordinary general rules for contracts. The state statutes regulate the conditions for licensing foreign insurance companies with more or less effect upon the content of the contracts. To what extent the power of the states to regulate insurance contracts is restricted by the federal Constitution, has been the object of a long line of decisions of the Supreme Court. The interrelation among these three levels offers rarely noted problems of its own that reach beyond the task of this work.

1. Judicial Doctrine

In treatises respecting conflicts law, the Restatement, and the overwhelming majority of judicial authorities—numbering many hundreds of decisions—, the law applicable to insurance contracts is determined by the ordinary general tests of contracts. Among them, the place of contracting is commonly regarded as the paramount factor. But this is not an absolutely exclusive rule, and the place where an insurance contract is located has given rise to a complicated

system of rules of thumb. Complete surveys have been made by three outstanding writers.

(a) Beale. Only Beale and the Restatement postulate an exclusive rule of lex loci contractus. The confusion in determining the place of contracting is resolved in the Restatement by a tripartite distinction:

"§ 317. When an insurance policy becomes effective upon delivery by mail, the place of contracting is where the policy is posted.

"§ 318. When an insurance policy becomes effective upon delivery and is sent by the company to its agent and by him delivered to the assured, the place of contracting is where it is thus delivered to the assured.

"§ 319. When an offer for an insurance contract is received by the company through a broker who acts for a client, and the policy is effective on delivery, the place of contracting is where the policy is posted or otherwise delivered to the broker."

This scheme has been suggested by a great number of cases and has influenced more. Apparently, it furnishes objectively conceived contacts, favoring the insurer insofar as he may choose the way of sending the policy, determining the applicable law. Beale has been receptive to the argument that the company sends the policy to its agent in order to keep control of it until the condition is fulfilled which makes it valid. The courts have certainly assumed that the last act of contracting is deferred when the agent has still to ascertain the good health of the insured or to receive payment of the first premium. But the rule expressed in § 318 has often been used where no continued control by the agent has been intended.

Whether the obvious oversimplification of the decisions in this set of rules presents an advance or not is doubtful. But a cardinal defect is that the Restatement reproduces

1 2 Beale 1054 ff.
merely the ritualistic gestures of the courts. Other authors have looked to the practical results.

(b) Batiffol.² In his delicate research, the French scholar notes the application of the law of the place of contracting in the vast majority of the American decisions, although in many cases this place coincided with the place of payment of premiums or with the location of the insured objects. Batiffol’s statistics deserve attention: The place of contracting was found in approximately 75 per cent of the cases at the domicile of the insured.³ The common law principle that a contract is completed by the dispatch of the acceptance would stand in the way, whenever the company simply accepts the initial application (an observation confirmed by the theoretical admission in § 317 of the Restatement quoted above). But the courts have used various devices to overcome this obstacle such as playing up small divergences in the policy as compared to the application and by insisting that the delivery into the hands of the insured is essential, when the policy is under seal and not mailed, or the agent has to exercise some control before he delivers the policy; at times the courts have given no explanation. Batiffol states expressly that the frequent justification that the agent had to check on the health of the insured at the time of the delivery, is rather farfetched. Many decisions bolster their arguments by defining the domicile of the insured as the place where the first premium has been paid.

In the remaining 25 per cent of the published decisions, the contract has been held to be made at the home office of the insurer. This has sometimes been justified by the

² Batiffol §§ 330, 338 bis, 341 ff.
³ Id. § 336. The recent decisions follow the same pattern. Bradford v. Utica Mut. Ins. Co. (1943) 179 Misc. 919, 39 N. Y. Supp. (2d) 810 is particularly noteworthy; here the court sets a striking example how this practice, combined with the adventures of husband-wife tort liability, manages to establish an insurance liability not existing, for one or the other reason, in either of the two involved states, New York and Massachusetts.
fact that the client sent the first premium with his applica-
tion, but often no reason has been advanced.

The judges believe the insured best protected under his
domiciliary law. In some cases, however, the mechanical
rule has been followed so faithfully as to disregard an ex-
press stipulation for the insurer’s law more advantageous
to the insured⁴ or to localize the contract at a place where
neither party was domiciled.⁵

(c) Carnahan.⁶ In the only monograph on the subject,
a specialized voluminous treatise on the conflict of laws
regarding life insurance, the expert author prudently dis-
tinguishes life insurance from other insurance and divides
the problems involving life insurance into small compart-
ments. These are concerned with the form of writing in-
surance, the various modes and conditions of delivering the
policy, the warranties and representations made in applica-
tions, the rights of beneficiaries, the assignment of policies,
the various nonforfeiture provisions, the death of the cestui
que vie, limitation of action, incontestability clauses, and
statutory penalties and fees. Within these parts smaller
segments are formed. The basic contention is that within
such a section or segment the courts handle the cases “in
one of a few limited ways.”⁷ Uniformity limited to these
individual problems is claimed in the sense that there are
majority rules.⁸ But the author reveals in the course of his
investigation many more distinctions. Thus, the effectiveness
of delivery for determining the place of contracting is
allegedly decided by the query: Where is the last necessary
act? Yet:

⁴ Id. 311 n. 2, citing Mutual Life Ins. Co. of New York v. Hathaway
⁵ Id. 311 n. 3, citing Hicks v. National Life Ins. Co. (C. C. A. 2d 1894) 60
Fed. 690.
⁷ Id. 53, 495.
⁸ Id. 53.
"Actually one often suspects from the cases that selection was made with the consequence in view. The delivery concept is only a tool and how that tool will be employed in relation to problems of life insurance cannot accurately be determined merely by an inspection of the four corners of the insurance policy."  

The last act may be defined in such way that it occurs at the home office of the carrier [insurer], or at the place of physical receipt of the policy. But:

"The courts adopt one or another connotation of delivery which will connect the policy with the law of the state where the applicant resided and manually received the policy. Consequently there is not the extent of uncertainty in the functioning of the delivery concept in conflict of laws as would at first appear."  

For the law governing warranties and representations, "the courts have not consistently enunciated any single rule." The courts have decided conflict of laws cases as the result of a weighing and balancing of various factors in their relation to the laws of several states.

"In six jurisdictions the opinions . . . have stated inconsistent rules. But most courts have explained their decisions in terms of the rule of the place of making of the contract. . . . The cases reveal that a liberal statutory or decisional rule of the forum will be applied if the court, by adopting that connotation of delivery which relates to physical receipt of the policy by the applicant, finds that the forum was the place of making of the insurance contract. . . . Thus the net effect is to apply the law of the insured's residence at the time he applied for the policy, at least when it is more favorable to him. . . . To the extent that rules of the applicant's home-state are most liberal, it may be taken that courts will tend to determine that the contract was

9 Id. 204.
10 Id. 250.
11 Id. 325 f.
12 Id. 327.
made there and to adhere, with at least verbal consistency, to the rule of the place of making the contract." 13

Carnahan has summarized his findings in a forceful report in which he also asserts that

"Examples of the tendency to disregard conflict of laws rules in interstate transactions occur in every phase of insurance law, even in instances where the policy was taken out in another state. All too frequently, the court of the forum adopts and enforces its internal rule. ..." 14

(d) Conclusion. Carnahan’s well-founded criticism is rather restrained. Viewing the matter under the general aspect of conflicts law reform, we must state that atomization of the contract by dissolving it into various incidents is totally unsound and that if conflicts rules are not binding on the court they are not legal rules. In sum, there is a certain stability in the method of handling the various situations, but practically no law on conflicts concerning insurance. This is all that the mechanical rules have achieved.

In the search for the real objective of the courts operating these rules, one more point seems characteristic. The question of where the contract is made, is largely replaced by the question of where the policy has been delivered, that is, the document is manually transferred to the insured; when this, too, cannot be ascertained, according to a rule adopted for instance in Pennsylvania, delivery is presumed to have occurred at the residence of the insured. 15

The courts have had before them an overflowing mass of litigation in life insurance and relatively infrequent cases of other types of insurance. To these they have extended their questionable rules. But differences are notable,

13 Id. 328.
and certain types of contracts, such as especially marine insurance, fall out of the picture. *Lex loci contractus* and the casuistry of delivery are applied also to marine insurance, but its old history has preserved for it universal principles of maritime law serving for the construction of the contract in agreement with other seafaring nations. The courts preferably interpret the contracts “in harmony with the marine insurance laws of England, the great field of this business.”

2. Statutes

In rare cases, decisions have pointed directly to the importance of the statutes, even to those of the forum. If they do, it is usually in order to declare that the statutes of the place of contracting are a part of the contract, which idea leads to a denial of party autonomy.

In reality, most branches of the insurance business are very intensively regulated in the states and territories and the statutes have made various attempts to prescribe the application of domestic law to insurance contracts.

These provisions, however, despite a trend to unification,

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17 As an exception, see, e.g., Yeats v. Dodson (1939) 345 Mo. 196, 206, 127 S. W. (2d) 652, 656 where the authorization to make insurance contracts at offices in Kansas City, Missouri and nowhere else is the principal of four reasons to apply Missouri law, thus avoiding a clause.

still differ on the point here in question and, notwithstanding many improvements, still need reform. It is a rather obscure matter, somewhat neglected in the literature.

Tentatively, we may distinguish the following types of statutory provisions for governing insurance contracts.

(a) In some states, all policies of insurance issued for delivery or issued and delivered within the state are declared subject to the provisions of the domestic law, either as a condition of licensing foreign insurers, or by subjecting foreign and domestic insurers in one clause to the insurance statutes.

(b) In some statutes all insurance contracts on the life of residents and property or other interests within the state, are deemed to be made within the state and subject to its law. Contrary stipulations are sometimes declared void.

It may be noted marginally that in the flood of statutes in 1947–1948 mainly regulating insurance rates it has appeared natural to extend their scope to insurance on property or risks located in the state.

(c) Many provisions prohibit specific contract stipulations or prescribe certain clauses.

Other statutes contain variations or are difficult to place. In particular, the meaning of many provisions indiscriminately addressed to domestic and foreign insurers is ambiguous.

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25 Patterson, “The Conflict Problems etc.,” American Bar Assoc., Section of Insurance Law, 1937–38, 69 at 71 calls these statutes the “internal law group” and describes their criteria at 72 ff.
The over-all result, however, is a broad claim not only to regulate insurance business by administrative prescriptions but also to control insurance contracts of domestic and foreign licensed insurers by the domestic private law. In this regard, the statutes are efficiently supplemented by supervision over the policy forms to be used. Consultations between the commissioners or superintendents and the companies about intended changes of legislation result, as I am told, in a satisfactory understanding as well as a vigorous influence by the state.

Insurance carriers and state legislatures have considerably simplified the matter by establishing standard policies. These are nation-wide in the case of insurance against automobile liability and workmen’s compensation, or are similar in all but a few states, as in fire insurance, or they are uniform for a group of states, as in theft and burglary insurance. But although it is possible for the companies to comply with the various requirements of financial security and investments in the different states by obeying the highest standards, the heterogeneous private law provisions may not be easily satisfied. At the same time, a typical policy clause says in fact that “terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.”

If this is the living law, working as a whole, it would appear without much question that the law of the books and of the decisions is very improperly correlated. How do both spheres co-operate?

The answer should lie with the definitions of the contracts


which the domestic law claims to govern, or at least of the contracts under its administrative supervision.

We do not know, however, whether it is a singular pretension or presents the rule generally in mind of the legislatures, when the statute of Alabama prescribes:

"All contracts of insurance the application for which is taken within the state, shall be deemed to have been made within this state and subject to the laws thereof,"\(^{28}\)

or what is the exact meaning of the Utah provision:

"Every insurance contract made through an authorized agent . . . shall be deemed to have been made in the state of Utah irrespective of where the insurance contract was written."\(^{29}\)

Usually foreign corporations are not considered doing business in a state when they maintain only soliciting agents there, but insurance is a special matter. We encounter, in fact, divided opinions.\(^{30}\)

The universal trend, of course, towards extension of government control, in the states of this country as well as in Europe, produces results such as in Canada. Insurance

\(^{28}\) Alabama: Code (1940) tit. 28 § 10. The Annotation declares that this is a constitutional provision, citing State Life Ins. Co. v. Westcott (1910) 166 Ala. 192, 52 So. 344.


\(^{29}\) Utah: Code (1943) tit. 43 c. 3 § 23.

\(^{30}\) 44 C. J. S. Insurance § 82: "A foreign company may be doing business in the state, if it actively solicits insurance and collects assessments . . ."; to the same effect, 29 Am. Jur., Insurance § 41, Supp. 1948 p. 78 new par. But compare Fletcher, 18 Cyc. Corp. § 8725: "... the mere solicitation of insurance through agents in such state, and the mere receipt or collection of premiums . . . does not constitute business there unless other activities are engaged in by the foreign corporation in the foreign state."

In a case involving contribution to an unemployment fund, the Supreme Court, in International Shoe Co. v. Washington (1945) 326 U. S. 310, 320, found activities carried on through soliciting sales agents so systematic and continuous throughout years as to justify liability for contribution. This, certainly, is an exception to the rule.

In McGee v. International Life Ins. Co. (1957) 355 U. S. 220, the Supreme Court upheld a California statute providing for jurisdiction over foreign companies in cases where suit is brought on insurance contracts with residents of that state. This, again, shows that insurance is a special matter.
contracts "deemed to be made in the Province" will be assumed subject to its law when a local residence has been indicated in the policy or application, even though there is no actual residence in the state.\textsuperscript{31} However, the same result is reached by construction also if the contracts are really made in the Province.\textsuperscript{32} Thus, two jurisdictions are immediately in a positive conflict.

For all connected questions, an exact definition of doing insurance business in a state is highly desirable but seldom afforded. An exception is Illinois where the following acts if performed within the state are declared to constitute transacting insurance business:

"(a) Maintaining an agency or office where contracts are executed which are or purport to be contracts of insurance with citizens of this or any other state; (b) maintaining files or records of contracts of insurance; or (c) receiving payment of premiums for contracts of insurance."\textsuperscript{33}

For describing the insurance contracts subject to supervision, the statutes usually emphasize issuance and/or delivery of the policy in the state. As Patterson has discovered, delivery, "the crucial word," is ordinarily supposed to occur at the residence of the applicant who is usually the insured, whereas the domestic insurers are normally said to have "issued" the policy.\textsuperscript{34}

In the entire picture, the most clearly emerging ideas are that states desire to regulate, partially or wholly, insurance contracts when (1) the insured is a resident or (2) the insured property is situated in the state. The first case conforms to the majority of the decisions. The second point of view is in direct contrast to the court decisions that in


\textsuperscript{32} Re Mutual Benefit Accident Ass'n and Anderson (Ontario) [1941] 4 D. L. R. 347, commenting on Ins. Act, Rev. Stat. Ont., 1937, c. 256 s. 150.

\textsuperscript{33} Illinois: Rev. Stat. (1949) c. 73 § 733.

\textsuperscript{34} Patterson, \textit{supra} n. 25, at 74.
apparent consistency, for one or the other reason, recognize the law of the place of contracting even for fire insurance, although the objects are in another state.\textsuperscript{35}

3. Federal Constitution

The impact of federal restrictions on state power to regulate insurance has been a controversial subject for a long time. The fluctuating views of the Supreme Court of the United States on this subject, often discussed,\textsuperscript{36} have led ultimately to a minimum of interference with the state activity. Insurance may be regulated by any state as it sees fit, provided that the regulation is neither outrageous nor discriminating and can be justified in any reasonable manner.\textsuperscript{37}

The orbit of unchecked state regulation thus permitted,

\textsuperscript{35} To the same effect, Coffin v. London & Edinburgh Ins. Co. (D. C. N. D. Ga. 1928) 27 F. (2d) 616, because "fire insurance is a purely personal contract," but the court clearly construed the \textit{lex loci contractus} as truly intended by the parties, in order to maintain the validity of the contract. The Seamans v. The Knapp Stout & Co. (1895) 89 Wis. 171, 61 N. W. 757, because insurance does not affect title; Western Massachusetts Mut. Fire Ins. Co. v. Hilton (1899) 42 App. Div. 52, 58 N. Y. Supp. 996, because the insurance was payable in Massachusetts; Palmetto Fire Ins. Co. v. Beha (D. C. S. D. N. Y. 1926) 23 F. (2d) 500, 508, with constitutional argument; Vermont Mutual Fire Ins. Co. v. Van Dyke (1933) 105 Vt. 257, 165 Atl. 906, because of the "ordinary rule" of \textit{lex loci contractus}. For comment see infra p. 347 ff.


\textsuperscript{36} On the background of insurance regulation in the relationship of federation and state, see in particular Mr. Justice Rutledge in Prudential Ins. Co. v. Benjamin (1946) 328 U. S. 408, 413 ff.


\textsuperscript{37} Mr. Justice Black, dissenting vote, in Order of United Commercial Travelers of Amer. v. Wolfe (1947) 331 U. S. 586 at 630: "I had considered it well settled that if an insurance company does business at all in a state, its contracts are 'subject to such valid regulations as the state may choose to adopt.'"
in turn must be defined. Since *Paul v. Virginia*, the Supreme Court has simply used the customary criterion of the place of contracting. A contract made in Tennessee "was a Tennessee contract. The law of Tennessee entered into and became a part of it." Mississipi overreached its scope when it claimed control over a contract "made and to be performed in Tennessee."

However, the Due Process Clause, as in the last-mentioned case, and the Full Faith and Credit Clause did not operate so smoothly in other situations. In 1943, an event occurred of extreme importance for a basic contention of this work. The criterion for distributing state power over insurance was readily changed. Mr. Justice Black spoke for the court:

"In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizens insured or the protection of the state from the incidents of loss." (Reference to the opinions in the workmen's compensation case of *Alaska Packers.*)

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38 *Paul v. Virginia* (1863) 8 Wall. 168.
Accordingly in the instant case, the elements connecting the insurance contract with the state of New York were enumerated and held to prevail, including activities, visits, and consultations, prior to and subsequent to the making of the contract, and the location of the insured object.

This abandoning of the formalized old contracts presents a progress of immeasurable value. Their replacement by a method of balancing state interests in every individual situation, it is submitted, may not be the last word. It is too much like the method of ascertaining the most closely connected law by grouping all local connections, an operation vastly superior to *lex loci contractus*, but a source of great uncertainty. Conflicts law, advancing further, may once more suggest improvements in the constitutional doctrine.

4. Fraternal Benefit Associations in Particular

The different approaches in the three different spheres mentioned above are apparent in the treatment of corporations, including insurance of the members among other social purposes. The ancient Roman *collegia funeraticia* have their analogy in the fraternities taking care of the funerals of their members. From modest beginnings, certain American fraternal benefit associations have developed into very powerful companies using the same methods of business as ordinary insurers. Therefore the problem arose whether

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42a In *Clay v. Sun Insurance Office, Ltd.* (1960) 363 U. S. 207 the plaintiff, while being a resident of Illinois, purchased there from defendant an insurance policy requiring that suit for a loss be brought within one year of the discovery; after having moved to Florida, plaintiff sustained losses there and instituted an action more than 12 months after discovery. A minority of the court was willing to affirm the application by the District Court of a Florida statute invalidating the time limitation of one year, which presumably was valid under Illinois law; but the majority held that the constitutional question was prematurely put and refused to answer it.

the insurance relationship of the corporation to the members is governed by the law of the charter state conformably to the principle of personal law or follows the same law as an ordinary insurance contract.

(a) The courts were divided. A minority applied the law of the home state of the corporation. For the most part, the lex loci contractus prevailed.

(b) The state statutes commonly have excluded fraternal associations from their main provisions on foreign insurance carriers and subjected them merely to a restricted supervision. Nevertheless, under the title of public policy the home law has been disregarded in several cases which have raised the question of federal restraint.

(c) Recently the Supreme Court has declared by a narrow majority the prevalence of the charter state over the state where a member resides. An essential part of the reasoning, however, seems to rest on the argument that the state of South Dakota had licensed the association and thereby acquired full knowledge of the terms of its insurance conditions; "if a state gives some faith and credit" to the organization of a fraternal benefit society by another state, permitting its own citizens to become members of, and benefit from, it, "then it must give full faith and credit" to the burdens and restrictions inherent in the membership.

The practical significance of the decision is doubtful,


44 Supreme Lodge Knights of Pythias v. Meyer (1905) 198 U. S. 508; for the other cases, cf. 2 BEALE 1956 n. 6.


47 Id. p. 624.

48 Id. p. 625.
since the plaintiff corporation itself subsequently changed the clause in issue (for a short limitation on members' suits) and states are now expected to admit foreign fraternal associations less easily.

5. A Reform Attempt

In excellent reports to the American Bar Association in 1937, it was explained that the conflicts practice concerning insurance contracts is defective, and subsequently a committee under the chairmanship of Professor Patterson submitted a tentative draft of a Uniform Statute. Its first section was based on the principle that an insurance contract should be governed by the law of the state where the insured risk is situated. Life insurance should, for this purpose, be localized at the residence of the insured; insurance against loss or damage to property at the situation of the property; automobile liability insurance at the place where the vehicle is principally garaged, et cetera. Section 2 limits the application of the domestic law to the contracts delivered or issued in the state. Section 3 exempts coverage of risks located in different states.

The draft has been abandoned because of opposition from a number of representatives of insurance companies.

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49 See Note, supra n. 45, at 143.
50 Id. at 144.
51 American Bar Association, Section of Insurance Law, 1937–1938, Kansas City Meeting, 58 ff.
52 American Bar Association, Section of Insurance Law, Program and Committee Reports (for the Meeting at) San Francisco, July 10-12, 1939. See also Patterson, Essentials of Insurance Law (ed. 2, 1937) 52 ff. § 10.
52a The Restatement (Second), Tent. Draft No. 6 (1960) § 346h and § 346i, contains virtually the same proposition. See also Ehrenzweig, Conflict 516 ff.
53 American Bar Association, Section of Insurance Law, Philadelphia Meeting 1940–1941, 176 ff., reports by Ambrose B. Kelly, Robert E. Hall, and Hervey J. Drake. Henry, id. 173 sub (1) recognizes that the companies "escape liability" only by exception. The apprehensive arguments of Kelly, id. 178 f. against Patterson on the ground of unconstitutionality of rules other than the law of the place of contracting have since quickly lost their value.
Apart from certain amendments, they advanced the thesis, doubly astonishing in the mouth of insurers, that the present conflicts rules are all to the good and exclude any doubt. At the same time it was contended that the proposed local connections would provoke litigation. Force of habit is a strong force with lawyers! Professor Patterson's authority reinforces the conviction that in all three sets of American rules a change is maturing from legalistic tests to criteria indicating a connection with the scope of state supervision and with the risk insured. An analogous development of the European doctrines confirms the adequacy of the new method and contributes further suggestions for its use. There the conflicts literature has largely adopted the view of the specialists of insurance law that insurance contracts are of a peculiar nature due to the extensive influence of the supervising state which "directs" or "dictates" the contents of the contracts.54

II. FOREIGN LAWS

1. Traditional Tests

*Lex loci contractus.* As in other contracts, the law of the place of contracting has exercised a strong hold on insurance contracts. This is true, not only of the United States, as well as France and Italy, countries professing this principle, but also of several other countries.55 Particularly for maritime insurance, *lex loci contractus* is favored.56

54 See, e.g., LEREBOURS-PIGEONNIÈRE (ed. 7) 407 § 353.
55 Canada: *Re Mutual Benefit & Accident Ass'n* (1941) 4 D. L. R. 347.
Germany: RG. (Feb. 13, 1891) 47 Seuff. Arch. 3 (domicil of insurer);
(Nov. 11, 1928) 122 RGZ. 233. For other cases, see BATIFFOL § 350.
Italy: Former C. Com. art. 58; C. C. Disp. Prel. (1942) art. 25; CAVAGLIERI, Dir. Int. Com. 466 ff.
56 See RIFERT, 3 Droit Marit. (ed. 4) 369 § 2377; 2 JACOB§ 681; (most cases cited *supra* n. 55 concern maritime insurance); 2 Répert. 180 n. 5.
The Código Bustamante repeats this rule if it is not a contract “by adhesion,” for all insurance contracts, except fire insurance between parties of different personal law.\(^{57}\)

But a group of writers have adjusted the law of the place of contracting to the phenomenon of contracts of adhesion. Because the application is on the standard form of the insurer, the contract is completed by the insurer at his home office.\(^{58}\)

**Law common to the parties.** Nationality or domicil common to the parties has been stressed particularly if they are subjects of the forum,\(^{59}\) but this is an awkward rule.

**Lex loci solutionis.** A few decisions have localized insurance at the insurer’s place, apparently as a place of performance,\(^{60}\) but they rest on the assumption that the prevailing circumstances point to this place.

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57 Código Bustamante, art. 262, omits a reference to art. 185, but is considered to imply it by BUSTAMANTE, La Commission de Jurisconsultes de Rio 147; id., 2 Der. Int. Priv. 294 § 1377.

58 RIPERT, 3 Droit Marit. (ed. 4) 401 f. § 2409; DE SMET § 36; DIENA, 2 Dir. Com. Int. 462; CAVAGLIERI, Dir. Int. Com. 476 (thus evading art. 58 of the former Italian C. Com.). Cf. also Note, 22 Revue Dor (1930) 287.

59 England: DICEY (ed. 6) Rule 149: where an English merchant ships goods from England and insures them with English underwriter, English law, despite a foreign flag. DICEY (ed. 7) Rule 161 superseded the old rule by enunciating the principle that marine insurance policies are governed by English law if issued by an underwriter carrying on business in England.

France: Cass. req. (April 24, 1854) S. 1856.1.339; Trib. consulaire Alexandrie (June 29, 1874), aff'd, App. Aix (April 15, 1875), 2 Répert. 183 No. 29.


The Netherlands: See infra n. 63.

57 Código Bustamante, art. 262, omits a reference to art. 185, but is considered to imply it by BUSTAMANTE, La Commission de Jurisconsultes de Rio 147; id., 2 Der. Int. Priv. 294 § 1377.

58 RISSCHENBACH, 3 Droit Marit. (ed. 4) 401 f. § 2409; DE SMET § 36; DIENA, 2 Dir. Com. Int. 462; CAVAGLIERI, Dir. Int. Com. 476 (thus evading art. 58 of the former Italian C. Com.). Cf. also Note, 22 Revue Dor (1930) 287.

59 England: DICEY (ed. 6) Rule 149: where an English merchant ships goods from England and insures them with English underwriter, English law, despite a foreign flag. DICEY (ed. 7) Rule 161 superseded the old rule by enunciating the principle that marine insurance policies are governed by English law if issued by an underwriter carrying on business in England.

France: App. Aix (March 22, 1923) S. 1924.2.124 (maritime insurance; common nationality and flag).

Germany: RG. (Jan. 27, 1928) 120 RGZ. 70, 73 (German law for life insurance taken out in Vienna, Austria, by a German domiciled in Vienna from the local general representative of a German company; expressly overruling RG. (Feb. 13, 1891) 47 Seuff. Arch. 3. CONTRA: NAUSCHABAUM, JW. 1928, 1198; BRUCK 30 n. 84; KELLER in 4 Roelli’s Komm. (ed. 2) 23.


60 Germany: RG. (Dec. 5, 1902) 53 RGZ. 138; (Jan. 16, 1925) 34 Z. int. R. (1925) 427; Bay. ObLG. (June 24, 1931) IPRspr. 1931 No. 5; OLG. Köln (Sept. 9, 1934) IPRspr. 1934, No. 94.

Switzerland: BG. (Nov. 2, 1945) 71 BGE. II 287, 291.
2. Proper Law

The English doctrine has consistently maintained the force of express and presumptive party intention. "It is no doubt competent to an underwriter on an English policy to stipulate . . . according to the law of any foreign state." 61 Subsidiarily, the circumstances of the case may supersede even the English law of the place of contracting. 62 The prevailing Continental theory has been to the same effect. Express agreement, presumptive intention, or the law most closely connected with the contract have been looked for as a rule. 63 Particularly maritime insurance, naturally free from intensive state supervision, has enjoyed a long tradition of free choice. Among the criteria of choice of law, use

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61 Greer v. Poole (1880) 5 Q. B. D. 272, per Lush, J., cited by Dicey (ed. 7) 836 as a general rule. In Pick v. Manufacturers Life Ins. Co. (1958) 2 Ll. L. Rep. 93 per Diplock, J., the force of party intention has been confirmed, and from the circumstances given in the case at bar the learned judge inferred that the law of the insurer's head office (Ontario) governed a policy delivered to plaintiff in Palestine. For a comment, see Kahn-Freund, "Contractual Obligation and the Conflict of Laws: Contracts of Insurance," 22 Mod. L. Rev. (1959) 195.


63 Belgium: App. Bruxelles (Feb. 6, 1900) and other cases, see De Smet 49. France: Picard et Besson, 1 Traité § 303 (for contracts that are not forcibly French, see infra p. 344).

Germany: RG. (Dec. 23, 1931) IPRspr. 1932, 61 No. 30 with respect to the consent of the parties in form (separated from the contract against the better methods of the same court); (April 11, 1933) IPRspr. 1933, 40 No. 21. OLG. Stettin (Feb. 22, 1932) IPRspr. 1932, 79 No. 35 (party intention for the law of the German insurer according to all circumstances).

Greece: Fragistas, 1 Symmikta Streit at 347, proves full liberty of the parties to exist.

of a national standard form has much importance as in maritime carriage. 64

The Swiss Federal Tribunal, however, seems only to recognize an express agreement, formulated by at least one party. 65

3. The Law of the Insurer

More recently a theory has found great favor which again starts by recognizing the group of "contracts of adhesion," concluded on the terms of one party through mere acceptance by the other. The contract of insurance is certainly an outstanding example. The need for protecting the interests of the insured is evident and well known. 66 But this is a consideration of municipal policy everywhere.

In conflicts law it has been inferred that the place of the insurer is the center of the contract. In addition to the authors mentioned above who to this effect construe the place of the insurer as the place of contracting, increasing authority has directly adopted this law. 67 A sound formula-

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64 Congress of Antwerp on Commercial Law (1885) Actes 129 quest. 52.

65 BG. (Nov. 2, 1945) 71 BGE. II 287, 290 in this case acknowledges intention to apply German law. On the subsidiary rule, see infra p. 343 n. 80. On the requirement of an express agreement, see Ryser, supra n. 18, at 84 f.


67 2 Bar 148, 226; 2 Meili 375; Diéna, 2 Dir. Com. Int. 458, 3 id. 468; Jitta, 1 Substance 393; Joseph, 1 Z. int. R. (1913) 492; 2 Schnitzer (ed. 4) 734 f.; Kegel, Kom. (ed. 9) 562 f. note 193 before art. 7 EG. BGB.

Poland: Int. Priv. Law, art. 8 No. 5; Draft 1961, art. 15 § 2 No. 7.
tion has been achieved by the leading German scholar in insurance law, Ernst Bruck. He argues as follows:

In exceptional cases, individual agreements may be concluded in insurance of transport, vessels, credit, or against loss by money exchange. Other insurance contracts, however, usually follow a definite pattern, although some individual clauses may be modified or inserted. The totality of the contracts of one class form an economic unit conditioned by their essentially identical legal structure. To assume a risk requires technical as well as legal uniform planning. We must focus not on the isolated contract but on the group of similar contracts, when we look for adequate localization. Consequently, the contract centers in the country where the insurer uses his particular technique under national supervision.

Or to quote a French author:

It seems more normal to localize the contract at the seat of the insurer, because of the technical organization of insurance and the insurer’s duty of basing statistics on similar conditions, in order to calculate with some certainty. Often the idea of protecting the assured is invoked for justifying the application of the law of the place of contracting, but if the assured knows the law of his domicil, it is not shown that this law protects him better than the law of the insurer’s domicil.

Nevertheless, the concentration on the domicil of the insurer, by this reasoning, turns to its exact opposite in case of a branch or agency established in a foreign country since it forms a partial nucleus of contracts. Even on this basis several systems are possible. But in the majority of Euro-

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69 Picard et Besson, i Traité 624 § 304.
70 See, as an example, Brazil, Decreto-Lei of March 7, 1940, No. 2063 art. 7.
We do not hear much of the minority to which England belongs and in which Fragistas, “The Contract of Insurance in Private International Law (Greek)” in Symmikta Streit 341, 345 counts Greece. He maintains that a
pean and Latin-American countries, insurance contracts made through the general representative of a foreign insurer are in a compulsory manner subjected to a domestic law. This seems to have been suggested by the particular nature of the license needed by any insurer, which includes a grant depending on numerous prerequisites. The subjection of the contracts to the domestic law has been inferred from their presumptive intention, or voluntary submission, or by implication from the grant of the license.  

The impact of the territorial law on establishments of a foreign insurer is commonly very large in Europe and Latin America. The authority of the general representative whom foreign insurers must appoint, is broad, if not unlimited and unlimitable as in Germany. Often a company is not allowed to make contracts otherwise than by the local agent with residents of the state or with respect to domestic immovables. The local requirements of financial security and investment contribute to complete the division of an international insurer's business into separate territorial compartments.

An illustration existed in the Peace Treaty of Versailles. An Allied or Associated Power could cancel the insurance contracts of its nationals with a German company, in which case the company had to hand over "the proportion of its assets attributable to the policies so cancelled." In the case of a branch in a victor country, subject to the latter's right to liquidation, conflicts rules were expressed:

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Greek license to do business subjects the foreign insurance carrier to the Greek laws but does not force application of Greek (private) law upon contracts made in Greece.

71 BRUCK 30 n. 84; KEGEL, Kom. (ed. 9) 563 n. 55.


“Where contracts of life insurance have been entered into by a local branch . . . in a country which subsequently became an enemy country, the contract shall, in the absence of any stipulation to the contrary in the contract itself, be governed by the local law . . .

“In any case where by the law applicable to the contract the insurer remains bound by the contract . . . until notice is given to the insured, etc.”

The local state control over business establishments issuing policies played a role also in other problems after the First World War. A well-known New York decision went so far as to attribute to the New York branch of a nationalized Russian insurance company a distinct personality sufficient to keep it alive. The Swiss Federal Tribunal, in analogous reasoning, mentioned the importance of the obligatory Swiss general representative of any foreign insurer and the security furnished by the latter, and held that where a German obtained a policy through the Swiss branch of a German company, his rights were inaccessible to a French war liquidation. The German Supreme Court similarly assumed that an insurance policy issued by an Indian branch of the New York Life Insurance Company, but later wholly transferred to the Berlin branch of the company, could not be validly seized by the British custodian in India:

It may be left undecided whether the Berlin branch is an independent legal person. In any case it is represented by the general agent, entitled in its external relation to acquire


75 Swiss BG. (Nov. 4, 1920) 46 BGE. II 421.
rights independently and must therefore be treated like an independent legal person in domestic transactions.\textsuperscript{76}

Correspondingly, an American court, refusing jurisdiction in a test case for recovery of the cash surrender value from the New York Life Insurance Company, states that the policy was issued by the branch in Germany to a German resident and:

"The agency in Germany was established as a distinct entity, a German creation under German law. A reserve fund was made and all premiums received were placed in that fund and invested in Germany under German official approval."\textsuperscript{77}

Numerous consequences of this situation are perceptible.\textsuperscript{78} The entire theory calling for the law of the insurer's headquarters or its branch office, respectively, has been endorsed by contemporary writers,\textsuperscript{79} German and Swiss courts,\textsuperscript{80} and the Montevideo Draft of 1940.\textsuperscript{81}

If, however, the applicable law is to be dependent on

\textsuperscript{76} RG. (Nov. 26, 1920) JW. 1921, 245.
\textsuperscript{77} Heine v. New York Life Ins. Co. (C. C. A. 9th 1931) 50 F. (2d) 382, 385. The court says that 28,000 policies executed in Germany were sought to be enforced in this country.
\textsuperscript{78} E.g., Italy: Cass. (April 8, 1938) Foro Ital. 1938 I 823, Giur. Ital. 1938 I 755, 7 Giur. Comp. DIP. 1938, 323: the Italian "general agency" of a foreign insurer is an independent enterprise, hence its assets in the country may be separately liquidated; Cass. (Jan. 10, 1941) Foro Ital. Mass. 1941, 12, 10 Giur. Comp. DIP. (1944) 125 No. 25: hence, also, the Italian stock of insurances with reserves is a possible object of separate transfer.
\textsuperscript{79} Argentina: HALPERIN, El contrato de seguro (seguros terrestres) (Buenos Aires 1946) 64 § 57.
Austria: ALBERT EHRENZWEIG, sr., Deutsches (osterreichisches) Versicherungsvertragsrecht (1952) 29 f.
France: PICARD et BESSON, 1 Traité 624 § 304, supra n. 69; ARMINION, Droit Int. Pr. Com. 471 § 281.
Italy: LORDI, Istituzioni di diritto commerciale (1943) 34, referring to his work, 2 Obbligazioni commerciali 1032 § 831; CAVAGLIERI, Dir. Int. Com. 501.
Switzerland: KELLER in 4 Roelli's Komm. (ed. 2) 7 ff.; BG. (Nov. 2, 1945) 71 BGE. II 287, 292.
\textsuperscript{80} Germany: OLG. Königsberg (Dec. 9, 1930) Bl. IPR. 1931, 211; Bay. ObLG. (June 24, 1931) IPRspr. 1931, 13; RG. (April 11, 1933) IPRspr. 1933,
the influence of state supervision, the delimitation of the administrative state supervision is of primary importance. In the same connection the situation of the insured risk requires consideration.

4. State Supervision and the Situation of the Risk

The European doctrine concedes great influence to the scope claimed by the state for administrative control of insurance contracts.

In contrast to the traditional American emphasis on the legal completion of contract-making, the most thorough Continental authors have stated that doing insurance business requires carrying on of insurance operations, whereas the making of contracts is neither necessary nor sufficient. In the German opinion, any activities preparatory to or subsequent to contracting such as soliciting, advising, cashing of premiums, or watching the development of the risk, may be grounds for state supervision even though the contract may be concluded in a foreign country.82

Even taking this broad definition of the agent's cooperation in the individual contract as a criterion, delimitation of the scope of the domestic law requires additional facts. Definition of the scope of control in general is given by each state as it sees fit, and is often left to the controlling board of commissioners.83 But the laws leave gaps, and

40; see the comment by BATIFFOL 313 n. 6; BGH. (Feb. 11, 1953) 9 BGHZ. 34 and IPRspr. 1952-53, No. 37; BGH. (March 24, 1955) 17 BGHZ. 74 and IPRspr. 1954-55, No. 32.

Switzerland: BG. (Nov. 2, 1945) 71 BGE. II 287, 291, referring to its independently developed previous thesis, 51 BGE. II 409, that insurance of Swiss inhabitants by foreign insurers is subject to Swiss law. BG. (March 26, 1953)

81 Montevideo Treaty on Int. Com. Terr. Law (1940) art. 12 sent. 2 for life insurance: where the company is domiciled or has its branch or agency.

82 NEUMEYER, 2 Int. Verwaltungs R. 329.

83 NEUMEYER, id. 343 ff.

As to constitutional limitations on state supervision in insurance matters in this country, see Travelers Health Ass'n v. Virginia (1950) 339 U. S. 643.
choice of law is sufficiently distinguishable from discretionary delimitation of the scope of supervision, to be subjected, for instance in Germany, to court jurisdiction. 84

The literature has sought a desirable method of defining the limits of state control for the purpose of choice of law. Among the numerous solutions, 85 one has been prevailingly favored: In the insurance of persons their residence, in the insurance of property rights the situation of the property, and generally the place of the risk insured, are decisive. 86 The similarity of these results with the order of ideas leading in the United States to the recent theory of the Supreme Court and to the proposals of the Patterson Committee and of the Restatement (Second) is obvious.

A recent French development is of particular interest. First conceived for fiscal purposes, a theory emphasizing the locality of the risk has been extended to the application of private law. Foreign insurers submit reports on all contracts “signed or performed in France or Algiers... or any contract of assurance accepted by them and concerning a person, an asset, or a liability in these territories.” It is further provided that any contract of insurance not registered within a month from its date is void. 87 According to authoritative writers, this recent law implies that all activi-

84 This seems to be the true thesis of RG. (Feb. 21, 1930) 127 RGZ. 360.
85 NEUMEYER, 2 Int. Verwaltungs R. 348 f.
86 Montevideo Treaty on Int. Commercial Law (1889) art. 8 for insurance “on land” and transportation: where the object is at the time of contracting.
NEUMEYER, id. 350 advocates localization of the risk as to moveables at their ordinary place; and of liability and reinsurance at the center of the assets and liabilities of the insured.
87 Decree-Law of October 30, 1935, amending art. 2 of the Law of Feb. 15, 1917, complemented by Decree of Jan. 12, 1937 concerning the foreign enterprises or insurers doing business in France and Algiers. These provisions have been maintained in the Insurance Law, Decree-Law of June 14, 1938, art. 42.
ties of foreign insurers in France are compulsorily subjected to all "imperative French laws." Hence French law is applicable, not only the fiscal but also the private law, whenever the risk covered is situated in France. This means that life insurance or an individually agreed accident or health insurance is localized at the domicile or the habitual residence of the insured, if in France. A liability insurance is French, when the act involving responsibility covered should normally or principally occur in France. The object insured against fire, hail, and the like must be in France.

In this view, French law does not necessarily govern marine, credit, or fluvial insurance and reinsurance if they have foreign elements, nor are contracts signed in a foreign country and covering a risk situated outside France, subject to its law. These contracts are said to be the only subject matters of conflict of laws which follow the lines designed by Bruck.

III. Conclusions

The basic problems of conflicts of insurance laws could not by any means be exhausted in the foregoing report. But the fundamental trend in the efforts to reach conflicts rules more adequate to the real situation is rather obvious. The old rules clinging to the formation of the contract or its fulfillment are in this field particularly obnoxious, and in-

88 PICARD et BESSON, 1 Traité 618 § 301 arguing particularly (1) as to life insurance, cf. Laws of March 17, 1905 and July 13, 1930, (2) as to workmen’s accident insurance, cf. Decree of Feb. 28, 1899, (3) as to automobile accident insurance, cf. Decree-Law of August 8, 1935, and Decree of June 3, 1936, art. 6, and generally cf. Decree-Law of August 25, 1937. For other literature to the same effect, see DALLAZ, I Nouveau répertoire de droit (1947) 313.

89 Id. 623 § 302.

90 Still less are special problems discussed. See for Continental literature on double insurance, 2 Bar §§ 267, 335; BRUCK 48; 3 SMEESTERS and WINKELMOLEN 11 § 940; DE SMET 369 § 402; and on reinsurance, BRUCK 15; 2 Répert. 183 § 31; BatiffoL 317 n. 4; ARMINJON, Droit Int. Pr. Com. 487 § 297.

On the scope of the conflicts rule concerning insurance contracts, see BRUCK 16 f.; FRAGISTAS, supra n. 70, 356 ff.
tensive state control over the insurance business is recognized as the most powerful force localizing insurance activities of all sorts. When the Canadian provinces adopted the Uniform Life Insurance Act, the fact was stated with regard to alien insurers "that the very natural intention of the parties, who live and who do business here, legalized and protected by our laws, is that the insurance law of this country will govern the contract and rights which arise thereunder."[^91]

1. Special Choice of Law

It must be remembered even in this field that despite extremely large inroads of imperative norms into the contractual law,[^92] disposition by the parties is the primary principle and that the rules demanded are merely intended for use in the typical standard contracts.

(a) *Party autonomy.* As a principle, the right of parties also to stipulate for the applicable law in insurance contracts has been strictly affirmed in Europe.[^93] In the United


[^92]: On the compulsory rules applied to the contract, as a whole, and public policy opposing foreign law recognized as applicable in general, see in particular 44 C. J. S. 516 § 54; Batiffol 310 § 347; Bruck 26 ff., 37 ff.; Keller in 4 Roelli's Komm. (ed. 2) 71 ff.

An example of an illicit object of insurance, much discussed in Continental literature, involves the old prohibition against insuring the wages of master and crew of a vessel, still existing in German HGB. § 780 but restricted in Belgian C. Com. art. 191; see 2 Bar 227 n. 109; 3 Smeesters and Winkelmoelen 62 § 972 and cit.


[^93]: Inst. Int. Law, Florence, Resol. art. 2 n. f, 22 Annuaire (1908) 290.

Germany: Bruck, Privatversich. R. 39 § 5 n. 3; Hagen, Seeversicherungsrecht (Berlin 1938) 19 ("German conception").

Greece: Fragistas, supra p. 339 n. 70, at 347 and n. 2.

Italy: Diiena, 2 Dir. Com. Int. 462.


Switzerland: Rysser and Keller, supra p. 325 n. 18, tend to deny any party autonomy in insurance matters.
States it has sometimes been denied. But apart from the philosophy of private law, admitting for the sake of the argument the very system of a compulsory law of the place of contracting, it must always be remembered that in this country a state cannot impose its insurance law on parties contracting in another state. The forum, thus, is powerless to prevent the parties from eluding all of the applicable provisions of the forum, including its most vital "interests." It would be strange if they were not allowed to contract in the forum and stipulate for a foreign law, which nevertheless would not remove the imperative part of the domestic statute. This more considerate approach, under the present-day practice, even preserves extraterritorial effect to the public policy of the forum.

Now, as we are to abandon the system of mechanical rules, we have to discover the most suitable rules to replace them. But adequate conflicts rules for various types of insurance contracts cannot be stated except in a subsidiary function. The task would be forbidding, if these rules were to be imposed upon the parties with ironclad necessity.

(b) Special situations. Analogous considerations are due to the atypical cases. If we, for instance, postulate as a sound rule that fire or windstorm insurance should be governed by the law of the state where the insured object lies, we must yet recognize that two parties residing and contracting in one state to insure a risk located in Japan may be subjected to the law of the place of residence, in contrast to the case where they contract through their local agents in Japan. This consideration is entirely different

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94 See Vol. II (ed. 2) p. 414, cf. the Mississippi case referred to id. p. 528 n. 38.


96 See the analogous German reinsurance case, Vol. II (ed. 2) p. 526; and BG. (Jan. 20, 1948) 74 BGE. II 81, 88: Italian parties to an insurance of a transport from Rotterdam to Basle, Italian law, including Italian subrogation in contractual claims.
from those on account of which fire and windstorm insurance has been held not to fall under the law of the situs.\textsuperscript{97}

Dealing next with the subsidiary rule referring to the law of the residence of the insured, we shall concentrate on life insurance where this test points in an appropriate direction.

2. Life Insurance: Law of the Residence of the Insured

A majority of the American court decisions, by applying the law of the place of contracting in all insurance contracts, have reached the law of the domicil or residence of the insured. Many American statutes obtain a similar result through various formulas. European doctrines use the same criterion in restriction to insurance of persons, such as life, health, and accident insurance.

Yet if the results seem similar, the ideas underlying the localization vary, and the exact choice of the decisive contact must be shaped accordingly.

(a) Delivery of policy. American courts contemplate the place where the insured manually receives the insurance policy. As such, this place is so casual as to defy the purpose of conflicts law. The application of this test has been made tolerable only through added fictions.

(b) Inhabitants. The statutes may certainly be presumed to extend their protection to the inhabitants of the state, in prescribing standards of fair dealing and fair competition between insurers.\textsuperscript{98} This formula seems to include citizens of the state, residents and also probably even people temporarily present in the state.

Logically, the formula implies that the domestic law should govern all contracts of residents and exclude all

\textsuperscript{97} Supra p. 330 n. 35 and see the analogous situations in sales of immovables, supra p. 110.

\textsuperscript{98} Patterson, "The Conflict Problems etc.," supra n. 25, at 74.
contracts of nonresidents (at least, with foreign insurers). A proposal understood to this effect was opposed, advancing the example that life insurance has been obtainable only with exclusion of risk by flying, although some states prohibited "aviation riders"; a resident of such a state would be prevented from going to another state where he may obtain the usual policy.\textsuperscript{99} This objection is of doubtful value, but such meaning should not be ascribed to the rule. In the United States, the constitutional restrictions on state power and, elsewhere, principles of reasonable interpretation require more than domiciliary or residential conditions, as shown in the following essentially different constructions.

(c) Law of licensing state. If the applicable law is conceived as that of the licensing state rather than that of the insured's domicil, two basic conditions are required, to which the personal location of the insured in the state may or may not be a precondition. One of these conditions is that the insurer must do business in the state so as to need licensing. The other is that the local agent whom every foreign insurer is bound to appoint must be in some way connected with the individual contract.

The latter connection can be imagined in various manners. The minimum requirement has been indicated, for instance, in Germany and Alabama: any activity of a foreign corporation through its agent with respect to a contract suffices to justify the application of the domestic law, soliciting, receiving the application, delivering the policy, collecting the first premium, etc. Often making the contract is a condition. The Patterson Draft (Section 2) requires in all cases of insurance that the contract should be:

"Either delivered in this state by or through an agent or other representative of the insurer, or issued by the insurer

\textsuperscript{99} Amer. Bar Assoc., Section of Ins. Law 1940–1941, 173 No. 2 and 185 No. 4.
in this state for delivery by or through a person other than an agent or other representative of the insurer, . . .

which in case of life, accident, or health insurance is additional to the condition that the insured is a resident of the state when the contract becomes effective. (Section 1a)

In all these variants, a policy is not affected if the local agent has no part whatever in its negotiation. Many statutes, seeking to avoid evasion, therefore declare that any insurance concluded abroad with an insurer licensed in the state should be deemed as made in the state or declared void. Whether challengeable or not, insurance provisions transgress the reasonable limits of state power.

Insurance procured merely by correspondence with a foreign insurer, at least one not having a local agent, is left free. This agrees with the American practice and the German doctrine.

Thus far, however, we have presupposed that the conflicts rule selects its own criterion with respect to all life insurance contracts.

(d) Law of the state supervising the contract. Since many states refrain from imposing the imperative part of their private law upon insurance contracts not "made" in the state, it is a possible solution to make the application of the local law dependent on the individual regulation of doing business in the state. This would avoid applying

100 As illustration, see for the United States supra pp. 328, 330; for Brazil, McDowell, "Contratos de seguro celebrados no estrangeiro," 26 Rev. Jur. 252 (against the then existing decrees); and inversely in France, Sumien, "Des conflits de lois relatifs aux assurances sur la vie contractées irrégulièrement avec des sociétés étrangères," Revue Crit. 1934, 50, against a liberal decision of Cass. req. (March 21, 1933) published ibid. On the corresponding German controversy, see Bruck, Privatversich. R. 46 f.

Swiss courts recognize that a Swiss insurer doing business abroad and contracting there is under foreign law; see Keller in Roell's Komm. (ed. 2) 32.


Since the mail-order insurance business has grown enormously, modern American practice is evidently taking a new approach; see the Travelers Health Ass'n cases, supra n. 85.

102 Bruck 33.
the law of a state which does not impose it and thus obviate some complications. But the uncertainty now prevailing in many states with respect to what contracts are subject to supervision, would extend to private law.

The least uncertain term for a permanent living center is "habitual residence." Whether temporary residence should suffice ought to be expressly stated in the statutes.

3. The Law of Situs

Insurance of immovables against risks such as fire, storm, or hail, damage to glass, machines, or waterpipes, manifestly belongs to the sphere of the state of the situation. State care for agriculture, industry, and housing has become of such importance as to require intensive control over preventive policy as well as over the recovery of damage to domestic resources and investments.\(^{103}\) It is reasonable to apply the same test to movables "insured in a fixed location."\(^{104}\)

4. Various Kinds of Insurance

It is interesting that the American proposals of 1939 and likewise the French doctrine locate the center of liability for automobile accidents at the place where the car is principally garaged (or principally used, adds the American draft). Normally, this results in the law of the car owner's or user's residence and to that extent it does not justify the fear of uncertainty. But the residence by itself may well suffice for localizing all types of insurance not

\(^{103}\) Neumeyer, 2 Int. Verwaltungs R. 352; Bruck, Privatversich. R. 47. This kind of consideration seems to have escaped the opponents to Professor Patterson's proposal, Amer. Bar Assoc., Section of Ins. Law, 1940-1941, 178. Cf. Restatement (Second), Tent. Draft No. 6 (1960) § 3461.

On difficulties in multiple-location cases, see Patterson, Essentials, supra n. 52, at 57; Ehrenzweig, Conflict 517 f.

\(^{104}\) Draft of the Patterson Committee, Amer. Bar Assoc., Section of Ins. Law, Program 1939, 51 s. 1 (b), supra n. 52.
connected with another unquestionable central point. If it is the state control over territorial acts of the residents rather than the residence itself (as localizing the risk) that justifies the imposition of the state’s law, a fidelity or surety contract, or a group insurance covering health or accident, is correctly centered at the headquarters of the insured enterprise, as courts have generally held.

When workmen’s compensation insurance is brought under the law of the state where “the principal place of employment” of the employee is when the contract becomes effective, this approach comes close to the localization of the employer’s liability to which modern development tends, as discussed earlier.

5. Proposals

Continued studies by insurance experts will be needed to reconcile the possible differences of opinion on the precise local connections for various types of risks. But the desirable approach to the conflicts problem can scarcely be doubtful. As an attempt to show roughly the resulting principle, the following formulation is advanced with respect to life insurance and fire insurance, in the absence of a stipulation for the applicable law and of special circumstances.

A contract of life insurance is governed by the law of the state where the insured has his habitual residence, provided that this state claims administrative supervision over the contract, and that an agent of the insurer in the state has participated in the negotiation of the contract.

A fire insurance contract respecting immovables, movables, or other interests in a fixed location, is governed by the law of the state of the situation.

105 Draft, id. § 1 (d).
106 Supra pp. 194 f. (employment), 225, 236 (workmen's compensation).