PART NINE

SPECIAL OBLIGATIONS
CHAPTER 34

Money Loans and Deposits*

I. MONEY LOANS

1. Municipal Differences

In the systems of private law, rather than on rational grounds, certain contrasts in construing a loan contract have survived. Thus, the Roman requirement of actual delivery of the res, that is, coins or their equivalent, persists in laws still considering loan to be a "real contract," the mere promise being only a preliminary agreement (pactum de mutuo dando). At common law, the promise to pay money in consideration of the borrower's return promise forms a perfect contract. This result agrees with the modern construction of loan as a contract by mere consent.

The common law doctrine that the creditor of a fixed sum of money cannot claim damages beyond the amount of the

* In recent years several studies have been published dealing with conflict-of-laws aspects of these transactions: NIEDERER, Kollisionsrechtliche Probleme bei internationalen Anleihen, Festgabe für Eugen Grossmann (1949); LOCHNER, Darlehen und Anleihe im internationalen Privatrecht (1954) [hereinafter cited as LOCHNER—see Bibliography, infra p. 539, for other short citation forms]; RENÉ SCHMID, Kollisionsrechtliche Probleme bei internationalen Darlehen und Anleihen (1954); VAN HEcke, Problèmes juridiques des emprunts internationaux (1955).

1 VON SCHWARTZKOPPEN, 2 Rechtsvergl. Handwörterbuch 640.
2 France: C. C. art. 1892.
Germany: BGB. §§ 607 par. 1, 610.
Italy: C. C. (1865) art. 1819.
Spain: C. C. art. 1753.
And most other codes.
3 JENKS, 1 Digest § 462.
4 Switzerland: C. Obl. art. 312; nevertheless the pact preliminary to loan has some role, C. Obl. art. 315.
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loan and interest, is followed by few foreign codes; modern laws allow recovery of special damage. The main field for choice of law is furnished by the immense variety of usury laws. But time of repayment, burden of giving notice of termination, and the amount of interest due by force of law are also variously regulated.

Contracts involved. Conflicts rules concerning loans include ordinary agreements for opening of credit and principal debts secured by suretyship or pledge.

Rights involved. The usual problem raised in this subject matter deals with the law under which the duties of payment of interest and of repayment arise and are performable. Of course, the obligation, assumed by the potential creditor in a pactum de mutuo dando or consensual loan, of delivering the promised value likewise needs determination. But the conclusion will become obvious after the main discussion.

2. Connecting Factors

(a) Place of contracting. Many American decisions have determined the validity of loan contracts according to the law of the place of contracting. In most cases, however, no other localization was in question. A similar practice is observed in France. The only conclusion to be drawn is that the law of the forum has no imperative force.

Brazil: C. C. art. 1061; C. Com. art. 249.
Denmark: Law of April 6, 1855, § 3, see Die Handelsgesetze des Erdballs, Vol. 10, Das Handelsrecht und Konkursrecht Dänemarks, p. 67.
The Netherlands: C. C. art. 1286.
Germany: BGB. § 288 par. 2.
Italy: C. C. (1942) art. 1224 par. 2 replacing old art. 1231 which was disputed, see De Cupis, Il danno (Milano 1946) 189, 217.
Switzerland: C. Obl. art. 106.
7 For closer analysis, see Batiffol 203 §§ 229, 230.
8 Cass. req. (June 10, 1857) D. 1859.1.194, S. 1859.1.751; lower courts, see Batiffol 210 § 236.
9 Batiffol id. n. 3.
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Again, where both parties are domiciled in the state of contracting, this state, of course, determines the law.\(^\text{10}\)

(b) *The debtor's domicil.* In a view that has found expression in the Polish law, unilateral contracts are governed by the law of the domicil of the debtor.\(^\text{11}\)

The same rule has been adopted by the Swiss Federal Tribunal in a case where the sum of money was expressed in the currency of the debtor's state.\(^\text{12}\) Likewise, the French Court of Cassation applied the law of Ecuador to determine the rate of interest due from a borrowing company domiciled there; the loan was to be utilized in the company's operation in the same country, although the lender was domiciled in Paris and made the funds available there.\(^\text{13}\)

(c) *Place of repayment.* Many American decisions have resorted to the law of the place where repayment is due\(^\text{14}\) because the creditor's claim is deemed to be centered in this place. In some cases, the court presumed a corresponding intention of the parties,\(^\text{16}\) or the place coincided with the debtor's domicil and the place of his use of the money.\(^\text{16}\)

As a result, the place held decisive has sometimes been the domicil of the debtor, but in the great majority of cases the business place of the lender.\(^\text{17}\) It is scarcely feasible to


\(^\text{11}\) Proposals by Walker, 406 § 5 (1) and (2), though with some qualification.

Poland: Int. Priv. Law, art. 9 No. 1; applied in Polish S. Ct. (Nov. 18, 1936) 4 Z. osteurop. R. (1937) 380, though the money had been sent to another country.

Same proposal, Niboyet, 33 Annuaire (1927) III 222.

\(^\text{12}\) BG. (Oct. 8, 1935) 61 BGE. II 242, 244. In this suit, the parties invoked the German law, but this is only an auxiliary instance following the prevailing practice.

\(^\text{13}\) Cass. req. (Feb. 19, 1890) Gaz. Pal. 1890.1.460, Clunet 1890, 495.

\(^\text{14}\) List of cases: Batiffol 199 n. 1.

\(^\text{15}\) Nakdimen v. Brazil (1917) 131 Ark. 144, 198 S.W. 524.

\(^\text{16}\) Potter v. Tallman (1861) 35 Barb. S.C. 182; Lyon v. Ewing (1863) 17 Wis. 61; 2 Beale 1170 n. 3; Batiffol. 200 n. 1.

\(^\text{17}\) See Batiffol 201 n. 2.
explain all these decisions on one ground. But we may suggest that, whether the decisions say so or not, preferably the loan was localized with the lender when the lender was a credit institution operating from a central place of business on a uniform basis in several states.

In the German practice, the place of repayment is emphasized on the general principle of *lex loci solutionis*. But before any choice of law, the *lex fori* states for the purpose of this choice where the money should be repaid. This means normally the domicil of the debtor. By the same method, the domicil of the creditor should be decisive in Switzerland.

Recent advocates of *lex loci solutionis* recommend it as respects repayment of the loan and the payment of interest.

(d) *The creditor's domicil.* Some writers have urged the law of the lender. A rational attempt has also been made to infer this approach from the situation of the parties. The creditor is menaced by specific dangers, such as the debtor's insolvency, money depreciation, and difficulty of legal enforcement, whereas the borrower may use the funds at his pleasure and should mitigate possible damage; the risk of the creditor should at least be measured under his law. However, this is scarcely a consideration within the contemplation of the parties.

(e) *Place of using the money.* Certain French decisions have applied the law of the place where the loan should be

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18 RG. (Sept. 30, 1920) 100 RGZ. 79; (March 12, 1928) JW. 1928, 1196.
19 See Vol. II (ed. 2) p. 473.
20 RG. (Feb. 16, 1928) IPRspr. 1928 No. 35; (Jan. 14, 1931) id. 1931 No. 30.
21 BG. (Nov. 7, 1933) 59 BGE. II 397, 398; but see Vol. II (ed. 2) p. 474 n. 168.
22 BATIFFOL § 238.
23 HAMEL, 2 Banques 452 n. 2 § 920.
24 2 MEILI 55; NOLDE, Draft, 33 Annuaire (1927) II 940; SCHOENENBERGER-JAEGGI Nos. 280-281.
25 HERZFELD, Kauf und Darlehen 75.
The writers question what this means, viz., whether the courts point to the place of utilization or consumption of the loan or to the place where the money is delivered. The latter opinion emphasizing the place where the money is in fact delivered to the borrower has been explained by the technical construction of loan in French law as a real contract; the contract is completed only by delivery. But the point is obscure. It should be noted in addition that the cases dealt only with the scope of a French Law of September 3, 1807, on the legal rate of interest and reached the result that it was confined to "civil," i.e., noncommercial, loans contracted and consumed in France. Hence, the ordinary conflicts rule was not necessarily concerned.

3. Rationale

Loans may be granted either by financial institutions on a large scale to an indefinite number of customers or in isolated cases on individual terms. Each of these types requires separate discussion, although perhaps not different conflict rules.

(a) Individually determined loans. It may be taken for granted that no one objects to the law of a place at which both parties have their domicils and make the contract. Furthermore, the place where the loan is to be repaid, according to express stipulation or an unequivocal business usage, may be regarded as a characteristic localization of

26 Cass. civ. (Dec. 21, 1874) D. 1876.1.107, S. 1875.1.78, Clunet 1875, 353; Cass. req. (Feb. 19, 1890) Clunet 1890, 495; see supra n. 13; Cour Paris (May 23, 1912) S. 1913.2.21, Gaz. Pal. 1912.2.13 commented upon by BATIFFOL 212.

As an additional element for applying German law to a loan granted by a Swiss institution to a German brewery, the Swiss Federal Tribunal stressed the purpose of the loan, viz., for installations in the factory. BG. (Sept. 18, 1934) 60 BGE. II 294; 301.

27 For the first interpretation, BATIFFOL 211 § 237 n. 2 criticizing SAVATIER in Planiol et Ripert, II Traité Pratique (ed. 2) 478 § 1149 and authors cited by the latter.
the only obligation flowing from a completed loan.

The same cannot be said of a place of repayment solely determined by law,\textsuperscript{27a} since this very law ought to be selected and the municipal laws are far from agreeing where the payment is "performable."

In the civil law codes, with some difficulty, a common denominator may be found. The money is either to be paid to the creditor at his residence as of the time of contracting,\textsuperscript{28} or it is to be sent to him at the debtor’s risk and charge, although the “place of performance” may remain at the debtor’s domicil.\textsuperscript{29} It may therefore be suggested that the creditor’s country should prevail.\textsuperscript{30} This conclusion appears weak, however, if confronted with the common law. The principle that the debtor must seek the creditor, strong as it has remained, has no bearing since it is limited to places within the realm, or in the United States, within the debtor’s state. If a contract has been made outside this state, American courts consider payment due at the place of contracting, unless the creditor designates an authorized agent in the state of the debtor.\textsuperscript{31} In interstate and international contracts this conception seems to exclude the law of the creditor’s place.

In conclusion, there is no general conflicts rule for a loan individually contracted between private parties.\textsuperscript{31a}

\textsuperscript{27a} Accord, van Hecke, supra n. *; contra: Lochner 76 ff.

\textsuperscript{28} The Netherlands: C. C. art. 1429 par. 2.

Switzerland: Rev. C. Obl. art. 74.

Japan: C. C. art. 574, cf. 484.

\textsuperscript{29} Austria: Allg. BGB. § 905; Allg. HGB. art. 325.

Germany: BGB. § 270.

\textsuperscript{30} The result would agree with the writings cited supra ns. 24, 25, but is opposed to the prevailing German doctrine regarding § 269 BGB., see Vol. II (ed. 2) p. 473 n. 166.


\textsuperscript{31a} The new Restatement urges "the local law of the state where the contract requires that repayment be made"; see Restatement (Second), Tent. Draft No. 6 (1960) § 346k. In agreement with the view taken above, this rule
(b) *Mass operation by financial institutions.* The operation of banks and loan or savings associations necessarily involves central organization and conditions in which business is conducted and planned substantially for all the territory to be embraced. Despite concessions that may have to be made to the diverse state laws, it is vital for such institutions to base calculations and forms on one given law. Commonly, the borrower not only does not care what law may apply, but he does not expect his own domicil to be taken into account in this connection. This is manifest if he sends his application for credit to the address of the company in another state or deals with a company representative who only solicits applications, action on which is understood to be left to the central office. Not because the last act of concluding the contract occurs in the state of the company, but because this locality is prominent in the contemplation of the parties, does it determine the law applicable. The result agrees with the bulk of the cases, which stress either the place where the transaction is concluded by the company's consent, or the place of repayment, or in Europe and under the *Código Bustamante* the mass character of the operation.\(^{32}\)

It follows, however, that this approach has definite limits. A significant divergence occurs when the foreign corporation operates through a permanent agency in the state of the

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Switzerland: BG. (Nov. 22, 1918) 44 BGE. II 489; HERZFELD, Kauf und Darlehen 61.

*Código Bustamante*, art. 185.
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borrower, which issues loans in the name of the company. In this case, the contract has a local center. It should not make any difference that the agent may have to ask for the assent of the central office, where this appears as a matter of internal administration. Nor should the fact in itself that the company is considered to do business in the state be decisive, although many legislators think otherwise. State supervision over loans cannot be compared in intensity and importance with state intervention in such matters as insurance or utilities. The vague and inconclusive concept of what the states mean by doing business does not present a sound basis for choice of law. It should be noted, moreover, that even in the case where the customer deals with an agency or branch, it is this and not his own residence that is significant.

As a result, it is always the place of business of the lender that localizes a loan of money to be repaid in kind. If a branch or agency of the lender negotiates the contract, the question to be asked is not where, but by which office, functioning as a party to the contract, the loan is issued. This fact may at times be doubtful, but no more than in other cases of agency. A presumption would be helpful in the case of foreign corporations advertising offers of small loans with reference to their local agencies, that the agent is authorized to contract, and therefore the local law is implied.

4. The Obligation to Give the Loan

Whenever a loan or credit is promised by a finance corporation, the place of its establishment has a double function: it figures as the domicil of the promisor and as the center of the obligation of repayment. It does not seem

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32a Accord, EHRENZWEIG, Conflict 524; Restatement (Second), Tent. Draft No. 6 (1960) 139; Uniform Commercial Code § 4-102; VAN HECKE, supra n. *, at 69; LOCHNER 18 ff.
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doubtful that a bank credit is governed by the local law of the bank. For isolated contracts between private parties, again, no general rule is needed or possible.

II. Bonds (Debentures)

International credits are created by the most varied methods.\(^{33}\) We are not dealing here with credit operations between sovereign states, nor with state guarantees for bolstering the credit of other governments or of individual borrowers, lately much discussed in public international law.\(^{34}\) The loans expressed in partial obligations, however, which form our subject matter may be contracted by states or other public entities as well as by private persons.

(a) American loans of the 1920’s. After the First World War, during the great wave of private American loans to European states, municipalities, and corporations, the usual type of loan conformed perfectly to the technique used in large domestic loans by New York banks. It has been said that most debentures and bonds of this group contained an express submission to the law obtaining in the state of New York. Such a clause, more or less clearly drafted, at any rate,\(^{35}\) was frequently inserted in the “Trust Deed,” if not in the text of the bond. But even without stipulation, the transaction was commonly impregnated by the unmistakable style of New York. As a German court described such a loan,\(^{36}\) the bonds were issued by a New York bank; the sums expressed in the currency of the United States; the external appearance, form, and text of the securities as well as the concepts and stipulations of the debenture conformed to


\(^{34}\) J. Fischer Williams, 34 Recueil (1930) 81, 137; Lauterpacht 5; Mann, “The Law Governing State Contracts,” 21 Brit. Year Book Int. Law (1944) 11 ff.

\(^{35}\) Haudek 105 n. 3.

\(^{36}\) OLG. Köln, Senate of Saarlouis, JW. 1936, 203.
the habits, views, and needs of the American finance and monetary market; everything was calculated for admission to the stock exchange of New York. Also, the trust deed was usually agreeable to the American standard and modified only with respect to foreign mortgages to meet local exigencies.

This characterization corresponded with the distribution of economic power:

"When the post-war loans were floated, the American bankers were largely in a position to dictate the terms; and the loan agreements were usually drafted in New York and merely passed upon or modified abroad."\(^{37}\)

(b) *Decisive connection.* This transaction as well as the ensuing negotiable instruments were doubtless centered in New York. The purely American character of the contract created obligations, naturally governed by American law, between the parties and their successors deriving rights from the original transaction.

The law of the place of contracting, in such cases, can certainly not govern on its own merits. Nor has the debtor's domicil any importance. Also, the places of payment available to bondholders should not be overemphasized. It is true that in the loan contract, during the period between the two world wars, the debtor, whether a private or municipal corporation or a state, usually undertook to place all sums due for principal, premium, or interest on deposit with the bank in Manhattan charged with the service of payment, in immediately available funds, several days before the payment date. Thus, the debtor is significantly bound to the main place where payments are due. But this is only characteristic of the market at which the bank is located.

The lessons of experience point to two conclusions. In

\(^{37}\) QUINDRY and FEILCHENFELD, 2 Bonds and Bondholders (1934) § 634.
the first place, the most vital principle for every sound treatment of debenture rights is the economic and legal equality to be enjoyed by all holders of the same bond issue. Bonds are not so much characterized by the individual position of the particular creditor in relation to the debtor, as by the conditions appearing in the fundamental contract, defining the total claim of which the bondholder possesses a part. The serial number indicates this part of the debt; conditions of payment, redemption, conversion, and notice are agreed upon in the debenture. The total debt is also affected by such events as moratorium, mortgage foreclosure, consolidation, amortization, and premature repayment.\textsuperscript{38} The modern laws for the protection of bondholders contemplate associations or trustees acting in their common interest, et cetera.

In the second place, if the creditors of a bond issue are to be treated on the same footing, the applicable law can be chosen only once and for all on the basis of the original contract. This conclusion is probably universally recognized, but exactly what local contact it indicates has scarcely been discussed.

It has been correctly stated in France, however, that where the place of issue, the currency, and the place of payment coincide, neither the debtor's nationality nor domicil—as once was claimed\textsuperscript{39}—nor the purpose or place of use of the money is material.\textsuperscript{40} Likewise we may agree with a Canadian decision that where a bond issue was made in British Columbia, the debtor being there at the time, the mortgage being there situated, and the bulk of the provisions performable there, it did not matter that the three trustees named in the deed were residents of Oregon.\textsuperscript{41}

\textsuperscript{38} Swiss BG. (Nov. 10, 1923) 49 BGE. III 185.
\textsuperscript{39} 2 Bar 135; 2 Meili 274; 2 Frankenstein 354.
\textsuperscript{40} Lapradelle, Note, Nouv. Revue 1941, 204.
typical case of an internal American bond indenture, an Ohio corporation was the borrower, the mortgaged property was in Ohio, and the deal for the sale of the bonds was closed in New York, whereas an Ohio bank was named the trustee for the security of the loan and the service for payment was stipulated simultaneously through the participating banks of New York and Ohio.\textsuperscript{42} Clearly in that case, the New York market was looked to, if not for the volume of trade, at least for the leading significance of its quotations. Indeed, if similar combinations appear in international finance, it would seem that the main emphasis, despite multiple connections, always rests on the market on which the issue principally relies. This market should be selected as the decisive factor if a neat rule is desired.\textsuperscript{43} Hence, special rules are needed if the issue is distinctly divided into partial "tranches" to be placed on several international markets and the creditors are granted choice of currency (to be discussed in the next chapter). That issues of bonds may be subject to protective administrative regulation at any place involved,\textsuperscript{44} is important but should not affect choice of law.

III. Loans to States

Practice and discussions of the difficult border line between international public law and the private law, in the writer's opinion, converge in the result that loans made to a state by a private money lender in another country are subject to private law. This law, in the case of a private lender, moreover, is a particular state's law; it is not international law as ascertained by consulting the general prin-

\textsuperscript{42} Republic Steel Corporation to Central United National Bank of Cleveland and H. R. Harris Trustees, Purchase and Improvement Mortgage, Nov. 1, 1934.

\textsuperscript{43} Possibly, NUSSBAUM, D. IPR. 331, referring in an undefined manner to the "issue" or the placing of securities on public sale, has the same result in view. Clearly to the same effect: VAN HECKE, supra n. \textsuperscript{9}, 70; SCHMID, supra n. \textsuperscript{9}, at 72, 79 ff.; probably also LOCHNER 43 ff., 52 ff.

\textsuperscript{44} FICKER, 4 Rechtsvergl. Handwörterbuch 473 f. No. 9.
The main question is whether the governing law is regularly that of the debtor state, a view generally assumed and the one adopted by the World Court. The difficulties that this court immediately encountered and failed to master show that the rule is no longer tenable. It is likewise confusing to believe that, because one party to the contract is an international person, the contract loses its national character and becomes delocalized and internationalized.

The Supreme Courts of Austria, Denmark, England, Norway, and Sweden had no hesitation in subjecting the American loans to their respective governments to the abrogation of the gold clause by the Joint Resolution of Congress of June 6, 1933; a national law of the debtor

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45 See Lauterpacht 5.
46 Brazilian and Serbian loans, Publications Permanent Court (1929) Series A, Nos. 20/21; German RG. (Nov. 14, 1929) 126 RGZ. 196.
47 Accord, Van Hecke, supra n. 4, at 70 ff.; Lochner 68-69; Borchard, State Insolvency and Foreign Bondholders (1951) 65 ff.


country, on the contrary, would not have had the power to reduce the debt with international force. The Swedish *tranche* of the international Young Loan to Germany was determined under Swiss law by the Swiss Federal Tribunal.\textsuperscript{50}

In the future, of course, a fair protection of an investment may be accomplished by treaty through the efforts started before the last war,\textsuperscript{51} and if high hopes are fulfilled, by an international judicial forum. "Some day," it has been said, "we shall be led to create a veritable international law of business but this will be a future very remote."\textsuperscript{52}

IV. Money Deposits

The old controversy whether or to what extent a deposit of fungible things, to be acquired by the depositary and to be returned by him in unascertained equivalents of the same class (*depositum irregulare*) should follow the municipal rules of loan,\textsuperscript{53} has produced a contrast among the national laws. However, a money deposit with a bank ought to be considered a loan everywhere.\textsuperscript{54} Moreover, there is no reason to establish different rules for the choice of law because of such variations.

A deposit of money, whether as a sum or *in specie*, is naturally bound to the place of the bank or savings institu-

\textsuperscript{50} BG. (May 26, 1936) 62 BGE. II 140, Revue Crit. 1937, 138; (Sept. 28, 1937) Clunet 1939, 192.


\textsuperscript{52} Cassin, in Travaux du comité français de droit international privé (1934) 97.

\textsuperscript{53} See VON SCHEY, Die Obligationsverhältnisse des österr. allg. Privatrechts (1890) 55, (1895) 351.

\textsuperscript{54} See HAMEL, 2 Banques 95 ff. §§ 752, 753 on the contrast between French and German construction.
tion to which it is entrusted, on the double ground that the money is brought to that place to be conserved and repaid there and that the transaction is one of a mass of similar deals by the institution. Storage or warehouse contracts and agreements for the custody of valuable objects by innkeepers are similarly localized.

Even though, exceptionally, a deposited object may be recoverable at a place different from that of the domicil of the depositee or bailee, the contract will be most conveniently determined by the law of the latter place.

In general, it seems settled that the customer of a branch of a bank is to be treated under the law of the branch rather than that of the principal establishment situated in another country. In English decisions, repeatedly a bank debt has been regarded as tied primarily to the branch where the account is kept, for the purposes of legal representation, collection, administration, and redelivery.

A question different from that of the applicable law is whether the customer may or must sue the bank at the place of its branch; he has been required to do so as a measure of convenience for the administration of bank business, so long as he has no prevailing contrary interest.

55 3 FIORE § 1204; NOELDE, Draft, 33 Annuaire (1927) II 941 No. 14; FEDOZZI-CERETTI 748 shuns any rule.


57 England: Clare & Co. v. Dresdner Bank [1915] 2 K. B. 576; see N. Joachimson v. Swiss Bank Corp. [1921] 3 K. B. 110, 127; only in the case of nonpayment has the customer the right to sue the bank at its head office, apparently for damages rather than debt, see Hill, J., in Richardson v. Richardson [1927] P. 228, 232, 234. From Maude v. Commissioners of Inland Rev. [1940] 1 K. B. 548, KAHN-FREUND in Annual Survey of English Law 1940, 255 concludes that the customer may pay at the bank's headquarters, but the bank owes him at the place of the branch.


Germany: RG. (June 25, 1919) 96 RGZ. 162 (sembl).