CHAPTER 36

Sales of Movables

I. LAWS AND DRAFTS

1. Inadequate Proposals

(a) *Application of general conflicts rules.* Codes, restatements, and most court decisions as well as the great majority of writers have treated sale of goods as the main example for what they conceive to be the conflicts rule for all, or at

1 Special treatment has been given to this contract in the following treatises:

- LAURENT 192-229 §§ 126-158;
- DIENA, 2 Dir. Com. Int. 1 ff.;
- FRANKENSTEIN 295;
- NUSSBAUM, D. IPR. 269-271;
- BATIFFOL 161 ff.;
- SCHNITZER (ed. 4) 683 ff.;
- RESTREPO HERNÁNDEZ 69-76;
- RAAPE, IPR. (ed. 5) 517;
- KEGEL, Kom. (ed. 9) 572 ff.;
- DICEY (ed. 7) 819 ff.

In addition, see BAGGE, "Les conflits de lois en matière de contrats de vente de biens meubles corporels," Recueil 1928 V 127;


- HERZFELD, "Kauf und Darlehen im internationalen Privatrecht," 4 Basler Studien zur Rechtswissenschaft (1933);

- GUTZWILLER, "Das Kaufrecht," in Gutzwiller & Niederer, Beiträge zum Haager Internationalprivatrecht, 1951 (1951) 3-104;

- FREDÉRICO, "La vente en droit international privé," Recueil 1958 I 7;

- VON SPRECHER, "Der internationale Kauf," 24 Zürcher Studien zum Internationalen Recht (1956);


Hague Draft 1937—Draft of Convention on the Conflict of Laws in the Matter of Sales of Corporeal Movable, prepared by a Special Committee appointed by the Sixth Hague Conference, in their meeting of May 28 to June 2, 1931, Documents relatifs à la septième session pp. 4 ff. On this draft, see the report by JULIOT DE LA MORANDIÈRE, id. at 5 ff.

Hague Draft 1951—Draft Convention on the Law Applicable to Inter-
least for bilateral contracts. Indeed, not one of the numerous decisions in the United States, dealing with the law applicable to sales of goods, expresses any doubt on this point. In appearance, the court always chooses the law of the place of contracting, or that of the place of performance, following some fixed or casual axiom. The truth, however, is that often the real reasons behind the choice of law, notably as they appear in the more recent cases, are much superior to the pretended schematic rule.

In countries of the Latin group, the law of the nationality common to the parties or the law of the place of contracting, have been applied mechanically as a matter of course. Innumerable German and a few old Swiss decisions have indulged in their weird theory, splitting the problems according to whose obligations should be fulfilled at what place. The law of the place of performance is automatically applied

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2 For the United States, this has been stated by STUMBERG (ed. 2) 402 f.
4 BATIFFOL 174 § 193.
5 France: Trib. Dreux (July 22, 1925) Clunet 1926, 643; French law would have been better justified by the seller's French domicil than by the London buyer's French nationality.
7 The Netherlands: Hof Noordholland (Oct. 12, 1848) W. 1019.
8 See the surveys by LEWALD 249 ff. and by STAUB-KOENIGE in 3 Staub 765, Anhang zu § 372, Anmerkung 9.
9 Notably, BG. (Nov. 7, 1890) 16 BGE. 790.
10 See Vol. II (ed. 2) pp. 469 ff.
SALES OF MOVABLES

under the Treaty of Montevideo and the codes agreeing with this Treaty.\(^9\)

All these overgeneralized rules do not serve the purpose of locating the great bulk of international and interstate sales of goods with adequate assurance.

(b) **Cases without a problem.** The American cases, in which conclusion and "performance" are centered in the same state,\(^{10}\) according to the usual standards, offer no conflicts question. This observation may stand as a starting point, although there arise doubts when the various duties of the parties have to be complied with at different places.

What we doubtless may recognize as a settled principle is that the local law governs all sales executed and fulfilled at once in one place by both parties, such as in shops and open markets. This also accounts for the usual invocation of the *lex loci contractus* for market bargains in recent formulations.\(^{11}\) The analogous rule for transactions in fairs\(^{12}\) has been criticized and was eliminated from the last international drafts and from the Hague Convention 1955,\(^{18}\) because in modern industrial fairs delivery or payment is as often postponed as in other business.\(^{18a}\)

However, it should be likewise regarded as well settled

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\(^{9}\) See Vol. II (ed. 2) pp. 465 f.


\(^{11}\) Polish Int. Priv. Law, art. 8, 1; Vienna Draft 1926, Int. Law Ass'n, 34th Report (1927) 510; Hague Draft 1931, 7 Z. ausl.PR. (1933) 957; Hague Draft 1951 and Hague Convention 1955, art. 3 (3).

\(^{12}\) Vienna Draft 1926, *supra* n. 1, art. I, B (c) 1.

\(^{13}\) See 2 FRANKENSTEIN 318; SCHOENENBERGER-JAEGER, Nos. 264, 265, 268; Hague Draft 1931, art. 4, see 7 Z. ausl.PR. (1933) at 958; Hague Draft 1951 and Hague Convention 1955, art. 3. In addition see VON SPRECHER, *supra* n. 1, at 84 f.

\(^{18a}\) KEGEL, Kom. (ed. 9) 564 f.; JULIOT DE LA MORANDIÈRE, *supra* n. 1, at 27.
that when both parties, seller and buyer, are domiciled in the same state, where they undoubtedly make the contract, no foreign law is called for, unless stipulated for in their agreement.\textsuperscript{14}

\textit{Illustration.} Two Swiss firms made a sales contract in Switzerland for delivery f. o. b. Porto or Lisbon and payment by letter of credit on banks in Lisbon. Although the goods were to be imported into Switzerland, the Swiss Federal Tribunal, balancing the "criteria" of the presumable intention of the parties, pronounced that Portuguese law should prevail. Neither the parties nor the lower court had thought for a moment of such a possibility, and the federal court itself ended up without reversing the decision because the lower court would nevertheless apply Swiss law as the "presumable Portuguese law."\textsuperscript{15}

This conception is consistent with the idea slowly emerging from the international drafts\textsuperscript{16} that in doubtful cases the choice of law is restricted to the two domicils of the parties to the sale. Nationality, of course, has no claim in this matter.

The main problem, hence, is presented by executory sales contracts, where the domicils of the parties are situated in different countries, especially when other local connections are established by the acts necessary for the fulfillment of the contract.

(c) \textit{Special considerations.} Certain American cases, ap-

\textsuperscript{14} See, for instance, the sales contract in Handelsg. Zürich (Sept. 3, 1943) 2 Schweiz. Jahrb. I. R. (1945) 161, made in Switzerland by two Swiss firms, dealing with goods stored in Cadiz, Spain, and to be delivered there. That the price was payable in Switzerland was mentionable under the theory of presumable intention. See, moreover, Pound v. Hardy [1956] A. C. 588—H. L., a case of a sales contract between two English firms which was decided under English law, although the contract dealt with Portuguese turpentine to be delivered f. a. s. the buyer's ship at Lisbon. The same result would be reached under the rule in § 346g (2) Restatement (Second), Tent. Draft No. 6 (1960); see comment \textit{id.} at 106.

\textsuperscript{15} BG. (June 22, 1944) 2 Schweiz. Jahrb. I. R. (1945) 163; GUTZWILLER, \textit{ibid.}, notes his doubt on the right "balance."

\textsuperscript{16} See n. 1 supra.
plying the *lex loci contractus*, are dominated by the particular lines of thought to be found in the treatment of the statute of frauds,\(^{17}\) liquor prohibitions,\(^{18}\) Sunday contracts,\(^{19}\) and other exceptional subject matters.

2. The Important Contacts

In view of the nature of ordinary sales contracts, three local connections have been advanced: the seller's domicil, the buyer's domicil, and the place of the most significant performance. The place of contracting has lost favor.

(a) *The law of the seller.* The most recent and best prepared proposals, although not yet many enacted laws, subsidiarily subject obligatory sales contracts concerned with goods to the law of the seller's domicil.\(^{20}\) The Hague Convention 1955, in accordance with the Hague Draft 1951, provides in article 3 (1):

In default of a law declared applicable by the parties, under the conditions contemplated in the preceding article, a sale is governed by the internal law of the country where the


\(^{19}\) See Vol. II (ed. 2) pp. 565 ff.

\(^{20}\) Polish Int. Priv. Law, art. 8 No. 3: contracts concluded in retail business are subject to the law of the place where the seller is established. The Polish Draft 1961, art. 15 § 2 No. 1 subjects all sales of movables to the law of the vendor's residence.

Czechoslovakia: Int. Priv. Law, § 46 No. 1: sales in carrying on trade or manufacture . . . are subject to the law of the place where the seller's trade or manufacture is established.

Treaty of Montevideo on Int. Civ. Law (1889) art. 34, (1940) art. 38: domicil of the promisor of unascertained or fungible goods.

Institute of Int. Law, 22 Annuaire (1908) 290 art. 2 (d); Draft Nolde, B (f), 33 Annuaire (1927) III 198; Vienna Draft 1926, Int. Law Ass'n, 34th Report (1927) 509 B (a); Hague Drafts at the Sixth Conference, Actes p. 376, and Hague Draft 1951.
vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale is governed by the internal law of the country where this establishment is located.\textsuperscript{21}

In a considered argument, the Swiss Federal Tribunal, too, has found the seller's law to be suitable to the entire sales contract, neither the place of payment\textsuperscript{22} nor that of destination and receipt of the goods being regarded as having any substantial importance.\textsuperscript{23} This view finds its main justification in the dominant nature of the seller's promise to provide the buyer with the specific goods needed, while the buyer's obligation to pay the price has nothing distinctive among all the manifold money obligations.

Less impressive is the argument that the seller is in a considerably more insecure legal and factual situation than the buyer, since he bears the risk inherent in the supply and storage of the goods and in the capital investment involved and he carries extensive legal responsibilities, among other things for unknown defects of title and quality. Common law goes even further in extending his liability for damages. The laws cumulate an amplitude of remedies and options for the buyer. However, they do so because the economic power and organization of the seller make him prevailingly the stronger party. Moreover, the present laws do not help buyers to escape stipulations that nullify their legal advantages. Hence, the conclusion that the seller should at least be sure of the applicable law and not find himself open to some

\textsuperscript{21} See English translation of the Convention in \textit{Am. J. Comp. Law} (1952) 275, from which the above translation differs in only one respect; see \textit{infra} p. 72.


\textsuperscript{23} Swiss BGE., 32 II 297, 39 II 167; cf. Homberger, Obl. Verträge 50; Schoenenberger-Jaeggi No. 266. More recent decisions confirm the principle that in the absence of a choice of law by the parties the seller's law shall govern: BG. (March 22, 1951) 77 BGE. II 83, (Feb. 12, 1952) 78 BGE. II 74, (July 4, 1953) 79 BGE. II 165.
surprising foreign severity,\textsuperscript{24} is unconvincing. Besides, such argument is open to the general objection that a party is not necessarily better off with his domiciliary law and should not enjoy domestic privileges in international deals.

Emphasis on the seller's establishment is sufficiently justified by his complicated and characteristic duties in the normal development of interstate or international business. It is at the same time consistent with the need of any firm exporting goods to various countries, to be able to fix sales conditions on the basis of one central law. Where sellers deal in mass sales, as mail-order houses, automobile manufacturers, fruit growers, textile dealers, and many others, the central law cannot conveniently be other than that of the domicil.

(b) \textit{The law of the buyer.} Suggestions that the domicil of the buyer should be taken as the decisive contact, are infrequent. Certain of these proposals were manifestly unfounded.\textsuperscript{25} But a new effort in this direction has been made for a particular purpose. The international committees working on conflicts rules for sales made several successive attempts to complement the primary rule calling for the seller's law by elaborate exceptions for the benefit of the buyer. In the drafts of the International Law Association and of the Hague Conference, the law of the buyer has

\textsuperscript{24} \textit{HERZFELD}, Kauf und Darlehen 85-96.
\textsuperscript{25} The most surprising contention was expressed by \textit{CLAUGHTON SCOTT}, British delegate at the Sixth Hague Conference, who asserted that the British government would preferably agree to the application of the buyer's law if to rigid rules at all. He was moved mainly, however, by the idea that the bank of the buyer must examine the documents sent by the seller and should be able to do it according to the buyer's law. Due objections were made to this muddled argument by \textit{ALTEN, JULLIOT DE LA MORANDIÈRE} and \textit{USSING}. But the argument is wrong in the first place because the legal points to be examined by any bank are regulated by general conditions and customs rather than national laws. See moreover \textit{infra} Ch. 37 p. 100.

Another advocate of the buyer's law, \textit{KRONSTEIN}, 2 Bl. IPR. (1927) \textit{126, 133}, argues that the seller has sufficient opportunity to ask the buyer to submit himself to the seller's law, and if he does not use it, he should be judged according to the law of the other party!
been declared applicable to the entire contract under certain circumstances:

Vienna Draft, 1926, B (b):

The law of the buyer . . . shall, however, apply in the following cases:

1. Where the seller or his agent or representative concludes the contract during a visit in the country of the buyer.

2. Where the agent or representative of the seller has his office, whether principal or branch, which concludes the contract, in the country of the buyer and the agent or representative concludes the contract in his own name.

3. Where the agent or representative of the seller has his office, whether principal or branch, which concludes the contract, in the country of the buyer, and the movables at the date when the contract is concluded are situate in the country of the buyer.

This drafting is superlatively careless. If an agent sells in his own name, there is no sales contract other than his; if the contract of a casual visiting agent is subject to the local law, it is incomprehensible that contracting by a permanently established representative should not have the same effect; the mere presence of a supply for the seller has no relevant influence on the treatment of a sale of unascertained goods, at least not if delivery is to be made in another country, et cetera.

The eminent lawyers working at The Hague finally reached the following formulation:

Hague Convention 1955, article 3 (2):

Nevertheless, a sale is governed by the internal law of the country where the purchaser has his habitual residence, or where he has the establishment that has given the order, if the order has been received in such country, whether by

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26 See the criticism in Int. Law Ass’n 34th Report (1927) 498 (ERNST WOLFF, MITTELSTEIN, BARRATT).
the vendor or by his representative, agent, or travelling salesman.

What idea inspired the formulation of this exception? During the Sixth Hague Conference some delegates found the ground in a recourse to the *lex loci contractus* as identified with the *lex domicilii* of the buyer. Others rejected the *lex loci contractus* on principle, but explained that the exceptional rule was due to the situation of small buyers contracting with travelling agents and unable to ascertain the foreign seller’s law. It was generally emphasized that the result should not depend on the extent of an agent’s authority to sell, but a practical test should be preferred: when the seller or his agent of any kind, including one who may only solicit orders or merely accept an order as a messenger, is present at a place in the country of the buyer and the latter addresses his order to him, the domestic law governs.

The resulting requirements combine the buyer’s domicil with one condition of the conclusion of the contract, viz., the arrival of the buyer’s contractual declaration at an address in the same country. This is a rather strange rule. If the place where the contract is made is immaterial for the choice of law, as has been rightly assumed, why should a fragment of the making suffice to localize the contract? How can we hold that a contract be subject to the law of

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27 Basdevant, Actes de la sixième session 315, followed by a Belgian and a Polish orator.
28a This view is shared by Dölle, “Die 7. Haager Konferenz,” 17 RabelsZ. (1952) 161, 175. *Contra:* von Sprecher, *supra* n. 1, at 82, who takes the position that art. 3 of the Hague Convention 1955 as a whole is based on the principle of *lex loci contractus* (with only two exceptions) and that this is especially true of art. 3 (2). But von Sprecher overlooks that art. 3 (2) even applies to the case where only the offer is declared in the buyer’s country, whereas the acceptance is made in the seller’s country. In this case it is very doubtful where the place of contracting is situated; see Vol. II (ed. 2) pp. 455 ff. Therefore art. 3 (2) cannot be justified as a plain consequence of the *lex loci contractus* rule, not to speak of the objections to this rule itself.
one party, although the contract is made and entirely to be
performed in another country? However, if it is only in-
tended by this simple device to avoid the difficulties of
searching for the legendary place of contracting, the most
essential objection to the *lex loci contractus* remains; the
external circumstances of concluding the contract have no
necessary relation to the character of the contract.\footnote{28b}

Again, why should the mere presence of a selling agent
in the country of the buyer influence the choice of law, if
the order itself, for instance, specifies that the goods are
deliverable at the principal’s factory or at a vessel in a
distant port? The problem of agency is not so simple. As
explained in another chapter, we must distinguish (1) the
authorization of the agent—the extent of which is, in fact,
governed by the law of the place where he acts on the
authority; (2) the contract between the principal and the
agent, which follows its independent conflicts rule; and (3)
the contract of the agent with the third party, in our case
the sales contract. We cannot always subject this sales con-
tact to the local law of the place where the agent happens
to act. Much less is the same tendency justified when a mere
messenger intervenes or an agent simply receives an order.

(c) *The law of the shipping place.* The experts at the
Sixth Hague Conference took no account of the well-known
fundamentals of international trade. Very probably, this
happened intentionally.\footnote{29} But in contrast it should be noted
that English and American courts have given consideration

\footnote{28b The exception in art. 3 (2) of the Hague Convention 1955 has also
been criticized in a well-grounded opinion expressed by the German Council
for Private International Law, of Feb. 29, 1956; see 24 RabelsZ. (1959) 151,
156, and for a French translation: Conférence de la Haye, Documents relatifs
à la huitième session pp. 234 ff. This opinion aiming at a modification of the
Hague Convention 1955 was submitted to the Eighth Hague Conference
(1956) by the German Federal Government. However, the majority of
delegations to the conference refused to discuss the German objections because
the Convention had already been signed by five countries. See Actes de la
RabelsZ. (1959) 1, 8 f.}

\footnote{29 See *infra* n. 48.}
to mercantile habits, and, as a matter of course, have applied the law of the place at which the seller is bound to make shipment of the goods.\textsuperscript{30}

\textit{F. o. b. contract}. Thus, it is the practice of English\textsuperscript{31} and American courts to apply the law of the seller’s state to the entirety of rights and duties flowing from the contract, whenever the seller, under the contract, has to deliver \textit{f. o. b.} at his factory,\textsuperscript{82} or to a carrier,\textsuperscript{83} cars,\textsuperscript{34} railway express,\textsuperscript{85} or at a shipping point.\textsuperscript{86} Correspondingly, the law of the buyer’s place applies when delivery is due at the buyer’s place.\textsuperscript{37}

A perfectly justified exception is made when, contrary to the prevailing usage, in an inexact, though not rare, language, the clause \textit{f. o. b.} is meant only to fix the price. When, for instance, two lumber dealers in Pittsburgh contracted for a car of lumber “\textit{f. o. b. Montreal},” but the seller fulfilled his obligation by shipping the goods in Ohio, the court correctly applied not Quebec but Ohio law.\textsuperscript{38}

\textsuperscript{30} Shohfi v. Rice (1922) 241 Mass. 211, 135 N. E. 141. More cases to the same effect will be cited in the following notes and on various occasions in Ch. 37.

Likewise, e.g., Switzerland: Trib. Genève (March 4, 1932) Sem. Jud. 1932, 523 (place of loading and furnishing of a letter of credit). In addition, see the cases cited in Restatement (Second), Tent. Draft No. 6 (1960) 107.


\textsuperscript{33} Johnson County Savings Bank v. Walker (1908) 80 Conn. 509, 69 Atl. 15; Denio Milling Co. v. Malin (1917) 25 Wyo. 143, 165 Pac. 1113.

\textsuperscript{34} Northwestern Terra Cotta Co. v. Caldwell (C. C. A. 8th 1916) 234 Fed. 491; State of Delaware, for Use of General Crushed Stone Co. v. Massachusetts Bonding & Ins. Co. (D. C. Del. 1943) 49 F. Supp. 467: moratory interests on the price are due according to Pennsylvania law, not because the “entire contract” was to be performed in Pennsylvania as headnote 13 asserts, but because seller has “accepted” the contract in his place in Pennsylvania and his responsibility ceased with delivery \textit{f. o. b.} Harrington, Pa.

\textsuperscript{35} Willson v. Vlahos (1929) 266 Mass. 370, 165 N. E. 408.

\textsuperscript{36} Griffin v. Metal Product Co. (1919) 264 Pa. 254, 107 Atl. 713.


\textsuperscript{38} Ward Lumber Co. v. American L. & M. Co. (1915) 247 Pa. 267, 93 Atl. 470. The contract was made in Ohio, \textit{cf. infra} Ch. 37 p. 83 n. 17.
A recent decision of the highest Swiss court applies the law of the place of f. o. b. delivery as a matter of course.39

In Germany, this question has been neglected, although there is a distinguishable controversy regarding jurisdiction. In commercial forms and regulations, the f. o. b. place has frequently been indicated to be the "place of performance," and this has sometimes been understood to include a stipulation for submission to the jurisdiction of the courts of this place.40 According to a contrary view, such clauses are merely concerned with the passing of the risk of loss.41

C. i. f. contract. As the clause of "cost, insurance, freight" is essentially a modified f. o. b. clause, we may consider the importance of the shipping places in both instances to be analogous. The tendency of business is equally strong to regard the place of shipping, at the f. o. b. place or to the c. i. f. place, as the "place of performance." The courts have known this for a long time. It is true that former Illinois decisions declared that in a sale c. i. f. Antwerp with shipment in New York, the seller's damages for non-performance were to be measured according to Belgian law as that of the place of "delivery."42 But these decisions were "in violent contrast with the general rule in other jurisdictions."43 A much-noted English decision concluded from this phenomenon that English jurisdiction over a contract,

39 BG. (Dec. 3, 1946) 72 BGE. II 405, 411: sale "wagon Tanger"; in this case, it is true, the goods were also to be examined and accepted in Tangier, but the court treats this acceptance as merely provisional. In another case the Federal Tribunal applied Swiss law in spite of an "f. a. s. Antwerp" clause, finding that this clause in the case at bar only meant to fix the price and did not designate the place of delivery, which was found to be Switzerland; BG. (July 4, 1953) 79 BGE. II 165. Thus the Federal Tribunal followed the same principle as the court in the above mentioned Pennsylvania case, supra n. 38.


41 GROSSMANN-DOERTH, Überseeaufkl 181-190.


SALES OF MOVABLES

based under Order XI r. 1 (e) on the place of performance, was to be denied where goods were shipped from Hamburg c. i. f. Tyne on the Thames. German trade forms and general conditions of mercantile organizations have widely identified the shipping place in c. i. f. contracts with the "place of performance." Again, this usually implies that risk of loss passes to the buyer when the goods are shipped at the port of dispatch. But it means also, in my opinion, that where the shipping place is in the seller's country, the parties intend that the courts of his country should have jurisdiction.

II. THE SIGNIFICANCE OF SHIPMENT AND ANALOGOUS ACTS

I. The Concept of Delivery to the Carrier

In the most usual types of international commerce, shipment is included among the obligations of the seller, although he is not obligated to bear the risk of loss during the travel of the merchandise. The English and Uniform Sales Acts have accepted this old and universal conception, stating that where, in pursuance of a contract, the seller delivers the goods to a carrier for the purpose of transmission to the buyer, property and risks presumably pass to

44 Crozier, Stephens & Co. v. Auerbach (1908) 2 K. B. 161—C. A., correctly criticizing Barrow v. Myers and Co. (1888) 4 T. L. R. 441. Another, definitely wrong, view was again taken in an obiter dictum by Lord Phillimore, in N. V. Kwik Hoo Tong Handel Maatschappij v. Finlay & Co. [1927] A. C. 604, 609—H. L., where the goods had to be shipped from Java to Bombay c. i. f. and the learned Judge asserted that normally lex loci solutionis would dictate the application of the law of the place of delivery, i.e., of Bombay.

45 Grossmann-Doerth, Überseekauf 245: "outright official formula" (in business).

46 As to risk, see Grossmann-Doerth, id. 247, 361 ff. As to jurisdiction, the same author, id. 245 ff., 362-364 construes the German clauses determining the "place of performance" to the effect that a seller in Hamburg stipulating for "f. o. b. Amsterdam" does not want to submit himself to the Dutch courts, and therefore any clauses fixing "the place of performance" should not be referred to jurisdiction, unless they say so, or the case is exceptional. Similarly Brande 119. But the conclusion is wrong in the case where the shipping place is in Germany.
the buyer. In traditional and widespread commercial thinking, much emphasis is laid on this act of the seller, because it forms the pointed end to all the multiple activities of the seller and indicates the time and place at which the goods, although not yet in the physical power of the buyer and very often not yet in his ownership, leave the custody and risk of the seller.

The types of commercial sale contracts are very diverse, however. They differ according to the peculiarities of various kinds of goods and according to the habits of the various trading centers and commodity exchanges. It has often been contended that the variety is too great to allow legal rules, or even uniform proposals for drafting individual sales conditions, to comprehend commercial sales in general. This objection, despite its annoying repetition by some lawyers, has not prevented the Scandinavian Sales of Goods Act of 1906, the Warsaw-Oxford C. I. F. Rules (1932) and the various drafts of an International Sales Act from establishing comprehensive regulations for sales in general, as a basis which may be modified for the various types of contracts. These generalizations, however, were only possible on the ground that the entire distribution of rights and duties in sales contracts rests on the determination of the place where the goods are expected to arrive at a certain time and to leave the seller’s orbit. Manufacturers most often sell their products, within the country and in export trade, to be taken at the factory yard or at the station of the factory. The many cases, in themselves somewhat different, where the seller’s obligation of active dealing with the goods extends to the dispatching of the goods from a seaport, as in most overseas transactions, form a group together with the others where the seller has to bring the

47 Sale of Goods Act, s. 18 rule 5 (2); Uniform Sales Act, § 19 rule 4 (2); Uniform Commercial Code, § 2-509 rule (1) (a).
thing sold to a river port, to barges, or to cars at a point on the way. On the other hand, the contract may promise to have the goods at the disposition of the buyer at his own place or station. The act of providing the goods at the seller's place of shipment, at an intermediate place, or of rendering them at the buyer's place or at any other place, has been technically termed *délivrance* (delivery) in the drafts of an International Sales Act. But since the American Uniform Commercial Code does not accept this technical meaning of delivery, we have to speak of shipment and tender of delivery. A possible name would be "surrender" of the goods by the seller.47a

Delivery or surrender in this sense is doubtless the center of the relationship created by sale between parties of different countries. In a c. i. f. contract, for example, the seller procures the contracts of freight and insurance up to the port of destination, but he bears responsibility and risk of loss only until shipment. This means that, if he sends goods conforming to the contract from his place to the port of shipment and the goods perish or deteriorate on the way with or without his fault, he has to substitute other goods in time or be in default. So soon, however, as he delivers the goods to the carrier and they are loaded or possibly when they merely reach the custody of the carrier, events beyond the control of the parties are at the risk of the buyer. According to the American draft of a sales law, such delivery would include transfer of title, which, in the prevailing opinion, rather, occurs when the documents, such as the invoice,

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bill of lading, bill of exchange, and insurance policy, are received by the buyer or his bank. But delivery includes the extremely important act of specification (identification, specialization) by which specified goods take the place of the unascertained goods described in the contract. In the correct solution, warranty of quality is directly dependent on the conditions existing at the time of surrender.

This concept of surrender has a variable element, since according to the different basic types used in commerce, the seller may tender the goods in any one of the places to be touched by the goods. In every case, it indicates the salient point in the course of any individual transfer. The activities of concluding the contract and preparing delivery, as well as the subsequent happenings when the goods travel, are unloaded, tendered, examined, accepted or refused, and stored, and when the documents are sent and received, are none of these so significant and distinctive of the contract in the estimate of average parties, as delivery to the carrier.

2. Shipment and Conflicts Law

Curiously enough, very rarely has the possibility been envisaged of connecting sales contracts with the law of the place of delivery to the carrier, except under the heading of lex loci solutionis, which, however, could refer to any act and in particular the physical reception of the goods.47b Even the writers especially devoted to the study of the commercial facts have neglected, if not definitely argued against, employment of this contact.

In the first place, it has been emphasized that the parties

47b The significance of the place of delivery is emphasized by Dicey (ed. 7) 821 and by Batiffol, Traité (ed. 3) 653. Following these authors and the first edition of the present book, the Restatement (Second), Tent. Draft No. 6 (1960) § 346g (1) subjects sales of moveables to "the local law of the state where under the terms of the contract the seller is to surrender the chattel." Apart from the substitution of "to deliver" for "to surrender" (see supra n. 47a), the American Law Institute at its 37th Annual Meeting (1960) has approved of this rule; see Proceedings 545-548.
SALES OF MOVABLES

select the f. o. b. point within the travel of the goods according to such facts as the tariffs of carriers, timetable of vessels, suitability of ports to the kind of merchandise sold, rates of transshipment, and business connections with transportation and insurance personnel. However true this may be, when the parties agree on such point, they do connect the contract with this place more than with any other. That the intention of the parties is not really directed toward any determined law, is no valid objection, so long as they have not specifically agreed on a different law.

Furthermore, it has been stressed that separate important local connections exist at the places where the documents are endorsed, or dispatched, or received. But if any rule of conflicts is needed to take care of these accompanying relations, it must be a special rule.

Shipment in a third country. Much more weight is attributable to the obvious consideration that the shipping point may be situated elsewhere than in countries of the parties. Neither the hypothetical intention of the parties, nor an objective evaluation of such cases can refer the determination of the applicable law merely to the place of shipment.

We have seen how instinctively the American courts have applied the law of the seller or of the buyer according to the situation of the f. o. b. point in the state of either. Again, there are American cases concerning an f. o. b. point in a third jurisdiction, that may help to find our way, although these decisions are objectionable on other grounds.

In a recent case, a firm in New York, dealing in malt and hops, through its commission broker in New Jersey, received an order of a New Jersey company for Polish hops, to be imported f. o. b. Philadelphia docks. The New Jersey court ascertained the acceptance of the order in New York and for this customary flimsy reason applied the law of

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48 BRÄNDLE 120.
49 BRÄNDLE 119.
50 See infra Ch. 37 pp. 100-101.
New York as the *lex loci contractus*.\(^{51}\) Despite the formalistic approach, it was correct to disregard the f. o. b. place in another state, which resulted incidentally from the importation.

Where a conditional sale was made in Massachusetts, the domicil of the buyer, and the seller was a Pennsylvania corporation, the shovel sold was to be delivered “f. o. b. Manchester, New Hampshire.” The decision of the Massachusetts court has often been criticized because of its failure to satisfy the law of the situs, New Hampshire, with regard to the retaking of possession.\(^{52}\) The court, however, was right in holding the delivery in New Hampshire immaterial for determining the law of the obligatory contract, even if no doubt had existed about the length of time during which the shovel should stay there. That the law of the forum was chosen could be justified by the domicil of the buyer in addition to the circumstance that delivery f. o. b. Manchester was stipulated at the buyer’s request and for his convenience. He wanted the shovel there and used it there, though not for long.

The English courts, too, are correct in applying English law to a contract made between English firms for delivery c. i. f. London, although the goods are to be shipped from New York.\(^{53}\) The real justification is that the shipping point in a foreign country appears immaterial for the legal relationship between the parties. *Lex loci contractus*, resulting in the application of English law, was incidentally harmless in one case,\(^{54}\) where hops were to be sent from the Pacific


Coast to England, since the selling corporation was established in London as well as in San Francisco and the buyer in Sunderland, England. Had the seller been domiciled only in San Francisco, the courts would have inconveniently subjected him to English law, as also the Hague Convention 1955 does, merely because the order was given in England. On the other hand, where a machine is to be installed at the place of the buyer, it follows that the buyer's place is the only decisive connection.\textsuperscript{55}

III. Conclusion

The international drafts have achieved a great progress in supplanting the \textit{lex loci contractus} and the \textit{lex loci solutionis}, the two mechanical and ill-fitted rules, by the law of the seller's domicil. Most decisions are really sustained by actual circumstances including this fact of domicil. But it is erroneous to formulate exceptions for the law of the buyer either on the basis, again, of the \textit{lex loci contractus} or of a fragment of the process of contracting. International sales in which the goods move from one country into another, gravitate toward the side of the buyer only if "delivery" is due at a place in his orbit.

There can be no doubt of this when delivery, always in the meaning explained before, has to be effected at the buyer's residence, factory, station, or pier. A buyer expecting the goods to be brought and offered to him in his own country quite as if they came from a domestic seller, can reasonably expect to have his domestic law applied. Nor would any other solution suit the situation of the seller. He may have his own storehouse in the country from which he intends to take the merchandise, or his agent may win him customers by promising local delivery. He also may

\textsuperscript{55} Canada, Ontario: Linderme Machine Works Co. v. Kuntz Brewery, Ltd. (1921) 21 O. W. N. 51 (right to reject).
send his wares to his correspondent on a bill of lading to his own order, retaining full title until subsequent delivery by the agent against cash. These are cases clearly requiring the application of the local law. To implement the vague ideas of the parties or the general conditions annexed to a sale, as respects primary obligations, default, excesses, substitute goods, and warranty, the law at the place of delivery has real advantages that have been too generally attributed to the law of the place of performance.

Between the extreme cases where delivery is to be made either at the seller's or the buyer's place, the intermediate points usually emphasized in trade can most often be counted within the sphere of one or the other. When an American or Canadian merchant ships goods on a through bill of lading by rail with subsequent transshipment to an ocean vessel, the transfer to the initial carrier, of course, points to his state's law even though the first stage of the carriage may end beyond the state line. It should not make any difference that in other countries no such genuine through bills are in use. Generally, whether the goods are shipped at a point in the seller's state or, in an overseas transaction, in a foreign state on his side of the ocean—as a Canadian seller f. o. b. New York, or a Swiss exporter c. i. f. New York with shipment in Amsterdam—the contract is still centered nearer to the seller. Nor is there a valid reason to abandon the seller's law if the Rotterdam agent of an Argentine exporter in the latter's name sells grains c. i. f. Rotterdam, shipment Buenos Aires, to a Swiss importer. Such persons domiciled and contracting in Europe know that the most important part of the transaction must occur overseas.

Illustration. In a case decided by the Swiss Federal Tribunal (July 20, 1920) 46 BGE. 260, a London firm through a Swiss agent sold to a Swiss firm in Switzerland Orange Pekoe tea from Ceylon c. i. f. Marseille. Swiss law was
applied because both parties invoked it. That the foreign firm "had to expect that the acts of its representative would be determined under Swiss law," should have bearing only on his authority. If the court had not been bound by stipulations of the parties on the applicable law, English rather than Swiss law ought to have determined the issue.

On the other hand, the situation is substantially different when the goods travel overseas at the risk of the seller and must be presented to the buyer at some place on the continent where the buyer's domicil is located. Where a Japanese trader sells silk to a manufacturer in Lyons according to the standard conditions of Lyons, in which the chapter on "shipwreck and other risks of transportation" annuls the contract in case of loss—one of the "avoidance" clauses usual in sales for arrival—the parties concentrate the effect of the contract in the port of arrival in Europe. As the natural contact therefore is not at the seller's place, it is at the buyer's place.

It deserves consideration whether the division of the countries into legal systems does not offer an analogous contrast. Suppose a United States seller ships goods from New York to Panama for a Colombian buyer, with the clause "to arrive" in Panama, would the buyer not expect to have his law applied rather than that of the United States? Without a profound difference in legal systems, where, for instance, goods are to be sent from a seller in Michigan f. o. b. Duluth, Minnesota, to a buyer in Chicago, no such importance can be attributed to the f. o. b. clause.

Apart from these uncertain enlargements, we may summarize as follows. The seller's law should be resorted to in all doubtful cases, with the exception that the internal law of the buyer governs the contract where the goods are to be surrendered at a place situated within the buyer's country. In other words, we may say that the law of the buyer's place should govern only if the parties have agreed on it, or if the contract is for surrender in the country of the
SPECIAL OBLIGATIONS

buyer or at a place fixed at his request outside the seller's orbit.

What is a party's place. The Vienna Draft defined "the law of the seller" by the following provision: "If the sale is effected by an individual in the course of commerce carried on by him, or by a firm, association, or corporation, the law of the seller shall be the territorial law of the country where, at the date when the contract is concluded, the office, whether principal or branch, which concludes the contract, is situate."56

As already pointed out, the Hague Convention 1955 declares applicable "the internal law of the country where the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale is governed by the internal law of the country where this establishment is located."57

The Convention refers to the place where the "order" is received so as to eliminate the vexatious question of where the contract is made.57a Moreover, the Convention uses the word établissement, which is meant to include headquarters as well as branch offices and even offices without commercial character.57b In this regard the translation of the Convention in 1 American Journal of Comparative Law (1952) 275 is not quite correct, since it translates établissement by "branch office."

Illustration: A has his habitual residence in country X without doing business there, and has a place of business in country Y. He enters into a sales contract with B, who has

56 Int. Law Ass'n, Report 34th Conference (1927) 509, B (a) (1). Cf. Poland, Int. Priv. Law, art. 9 No. 4: domicil of a merchant with respect to the course of his business is the seat of his enterprise; if he has several enterprises, the seat of that enterprise with which the transaction has been concluded, is decisive.

57 See supra n. 21 and accompanying text.

57a See JULLIOT DE LA MORANDIÈRE, supra n. 1, at 26; VON SPRECHER, supra n. 1, at 78; DÖLLE, supra n. 1, at 175 n. 3.

57b See JULLIOT DE LA MORANDIÈRE, supra n. 1, at 26.
his habitual residence and is doing business in country Z. The order is received by A at his office in Y. According to the French text of article 3 (I), second sentence, Hague Convention 1955, it is clear that the law of Y governs the contract.

Therefore the term “establishment,” uncommon though it be in this context, should be preferred in order to cover the broad meaning of the rule in question. In other cases also the French text may raise doubts.

Illustration: Assume the same facts as in the preceding illustration except that A does not receive the order at his office but rather at a hotel in another city of country Y. Thus the order is not received “par un établissement” though it is received in the “pays où est situé cet établissement,” and not in the “pays où le vendeur a sa résidence habituelle.” Considering that there is less contact with the country of the vendor’s habitual residence than with the country of his establishment, it seems to be more appropriate to apply the latter’s law.

IV. Special Kinds of Movables

1. Sales on Exchange

Sales of commodities in the course of transactions in an authorized exchange, like sales on a stock exchange, are subject to the usages of the institution. They are, moreover, subject to many administrative provisions and are executed in forms not used in ordinary business. From all these reasons, it has been concluded that such contracts are tacitly submitted by the parties to the local law, or objectively expressed, that this is the only adequate law.

68 Batiffol 182 § 199.
69 See Vol. II (ed. 2) p. 387.
60 Czechoslovakia: Int. Priv. Law, § 45.
Hague Convention 1955, art. 3 (3).
Brandl, Int. Börsenprivatrecht 59; Nibojet in Recueil 1927 I 101 ff., 33 Annuaire (1927) III 213; Frédérico, supra n. 1, at 57 f.; von Sprecher, supra n. 1, at 82 f.
2. Other Sales under Administrative Control

For similar reasons, sales are considered localized when they are made “by auction, by judicial process, by order of the court, or under an execution.”[61]

*Registered chattels—ships.* In view of the significance of registration, in a widespread opinion, the sale of registered vessels is governed by the law of the place of registration or of the flag. Thus, the Vienna Draft states:

As regards contracts of sale of ships, vessels and aircraft which are registered, the law applicable shall be the territorial law of the country where the ship, vessel, or aircraft is registered.[62]

This rule has been likewise suggested by Judge Hough in a dissenting opinion of 1921, where the court followed the *lex loci contractus*, on the ground that registration only gives advantages to the purchaser and is not essential for the passing of the title between the parties.[63] The register publicizes the legal situation of the vessel for the information of presumptive buyers, whose rights relating to third persons are more or less strongly influenced by the entry in the register.[64]

In many countries, this situation is complicated by prohibiting sales of registered vessels to aliens[65] and prescribing

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[61] Text of Vienna Draft, art. I, B (c) (x), following an American proposal, Int. Law Ass’n, 34th Report (1927) 506.
In the old case, Lynch v. Postlethwaite (1819) 7 Mart. (La.) 69, 12 Am. Dec. 495, the *lex loci contractus* (Mississippi) was applied, to satisfy La. C. C. art. 10.
[64] This is admitted by BATIFFOL 173 § 192 who nevertheless insists on *lex loci solutionis*.
SCRINI, 77, cf. 195 recognizes the ordinary test of *lex loci contractus*.
[65] E.g., England: Merchant Shipping Act, 1894, s. 1.
that sales be concluded before their consuls for the purpose of registration. E.g., Peru: C. Com. art. 591; certain privileged debts must be paid before the sale, id. art. 863. Cuba: C. Com. art. 578.

67 This suffices to render justice to BATIFFOL’s desire, 174 n. 1, to recognize the sale of a Norwegian vessel in Japan to be brought into Japanese ownership.

68 It may be remembered that the assignment of a patent right is coordinated to a sales contract quite as a transfer of title to a sale of a tangible thing. Exclusive licenses are also bought, although agreements on nonexclusive licenses may be better compared with leases.

69 Thus recently, BATIFFOL 183 § 200.
English patent to another German firm, but subsequently infringed this agreement by giving another license to a third person in an English contract. The court recognized the application of German law to the obligations of the grantor of the license. The case, of course, did not lend itself to a different choice of law.

(ii) Where two patented machines were sold in St. Louis with the option to purchase the patent rights for several countries and the right to have the machines patented in any European country, in an action for breach of contract the court considered the statute of frauds of the place of contracting and of the forum, but did not even mention the states in which the objects had been or might be patented.

The German practice, a little richer, brings out the same point somewhat more clearly. In addition to various cases where two domestic parties contracted with respect to foreign patents, the Reichsgericht also applied German law to the assignment of the exclusive exploitation of an Austrian patent, by a German chemist to a Viennese firm. The German seller of an invention to be patented by him in Italy is, of course, obligated under German law to take all the steps prescribed by Italian patent law.

4. Copyright

The modern right of authors to their literary or artistic products is not fixed in the territory for which protection is granted. It is distinguishable from the physical thing—manu-

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70 Actien Gesellschaft für Cartonnagen Ind. v. Temler and Seeman (1900) 18 R. P. C. 6.
71 Obear-Nester Glass Co. v. Lax and Shaw, Ltd. (C. C. A. 8th 1926) 11 F. (2d) 240.
72 See NUSSBAUM, D. IPR. 338 n. 2.
73 E.g., RG. (Oct. 11, 1911) II Markenschutz und Wettbewerb 254; (July 1, 1931) 51 Markenschutz und Wettbewerb 534, IPRspr. 1931, 197.
74 RG. (June 10, 1933) Leipz. Z. 1933, 1325, IPRspr. 1933, 44. It was also stressed that the price was fixed in marks and the parties invoked German law.
75 RG. (July 5, 1911) II Markenschutz und Wettbewerb 142.
SALES OF MOVABLES

script, painting, blueprint, film, etc. But it is not a mere part of the right of personality as one influential theory construed it. It is a privilege accorded by law as an absolute right to the ideal content embodied in the work. Hence, when transfer of a copyright is promised, there is no fixed local connection necessitating conflicts rules different from those referring to tangible objects. The agreement for transfer can be distinguished from the transfer itself quite as well as in the case of chattels. In fact, there are many formalities prescribed for the assignment of an author’s right, but they do not, as a rule, affect promises to assign it.

In this light, the German Supreme Court analyzed a contract of publication concluded between Viennese authors of an operetta with a publisher of Stuttgart, Germany, according to the presumable intention of the parties, as in any other contract for work. The interpretation in favor of the place of the publisher, however, is doubtful. My own suggestion, in the absence of agreement by the parties on the applicable law, is that the ordinary rules advocated above for chattels should apply.

Indeed, when a writer or artist himself promises to transfer—totally or partially—his right in the work to the extent that he has the power to do so, his own domicil is a fair point of connection. And where licenses are issued in mass, as to movie theatres, the place of the vendor again is an appropriate contact.

76 Theory of Otto Gierke, abandoned by most writers.
77 See P. Olagnier, 2 Le droit d’auteur (1934) 292.
79 Cf. Rabel, 27 N. F. Grünhut’s Zschr. (1899); Michaelides-Nouaros, Le droit moral de l’auteur (Lyon 1935); Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works, of July 22, 1946, art. XI.