CONFLICTS RULES ON CONTRACTS

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THE PRESENT CONDITIONS

Are the three hundred and fifty sovereign states said to enact legislation, engaged in making conflicts law? One thing is sure. There is no lack of competition in the making of substantive, adjective, and conflicts law, by enactments, regulations, or decisions. Busy legislative machines, large or as tiny as that of the Lilliputian principate of Liechtenstein, operate with varying speed and invariable noise, moving in different directions and disregarding one another. This babel of legislation is enough to intimidate lawyers and to frighten the public.

Of the legal systems, perhaps a hundred enjoy sovereign discretion in deciding the crucial problems of private law and more often than not in striving for jurisdiction over the same persons or contracts, with no superior power, no judicial recourse, and little treaty supervision above them. Recognized principles of public international law scarcely descend into this sphere. We should be very distinctly cognizant of this situation of personal and business life in order to appreciate the significance of conflicts law, that is, what it has done for us so far and what is required to enhance sufficiently its scope and intensity. That not all is well, should have been learned, however regretfully, from the fact that commerce in disgust has created its own realm, away from all national private laws, conflicts rules, national courts, and procedures. The merchants have found refuge in innumerable standard forms and in arbitration, now practically uncontrolled by any state's machinery, allegedly even in England. Research in international family law presents the picture of a jungle that has even overgrown the fences of the Constitution of the United States. It must also be stated that the enactments specially concerned with conflicts law are very poor in comparison with the codes and statutes of substantive law and that treaties and conventions—with such exceptions as the old Montevideo Treaties of 1889—have shown much less progress in conflicts law than in the field of unification of substantive law.

The principal cause of this failure is that we have replaced the former universal conflicts law by the several national conflicts laws and have for-

gotten that, although the sources of the conflicts rules are in fact different, their purpose should be to secure harmony. What law should apply to a contract? No law of nations, usually not even a statute, provides the answer. So the judge sits in his armchair and divides the world. Very well, but he divides the world without *knowing* it! And the literature does very little to inform and advise him. Some authors of private international law even write as if there were no greater wisdom available than what a provincial judge said in 1893.

Nevertheless, and it is also well to remark this, our disputes, including the former contrast between the international and the positivist schools and our present effort to establish an autonomous branch of law, are family quarrels, so long as we believe in a co-ordinated system of rules for the determination of choice of law. It would be foolish to believe that all the great waves of thought devoted to the conflicts problems during a century have drifted into nothingness. We may only regret that they have run too exclusively into narrow and shallow territorial waters.

The fresh start, required in a period when the western world must and can work together, is made possible by the comprehension and thorough methods of advanced modern legal science. It is a hard work, barely started, for scholars, not for judges. We must break through the isolating walls of the municipal systems and bring them into a sound relationship. This needs comparative research in the municipal *and* conflicts laws. It needs co-operation of the scholars of the diverse legal cultures, much patience and tolerance, and, utilizing all help available, a complete investigation of the international social and economic problems. To the system of an isolated law, as represented by the Iron Curtain, we oppose a multinational collaboration of writers with the primary objective of discovering and satisfying the common factual situations, the common conflicts of interests, and, as necessary technical equipment, the common denominator in terms of legal concepts and rules.

I am suspicious of statutes and national conventions not thoroughly prepared. The fundamental work involves the adjustment of every individual country's conflicts rules to its true purpose.

What this purpose is more exactly, is the problem to which I presently shall invite your attention. Certain doubts, felt occasionally by many of us, have been aggravated by a few scholars so as to threaten our age-old conception of this branch of law, and challenge even its *raison d'être*.

The purpose of uniformity ought to be emphatically restated. Since Savigny urged that the paramount goal for private international law should be identity of decision irrespective of the tribunal seized with a case, we

have all believed in this supreme purpose. Successive generations have estimated in different ways the undoubted difficulties, but have apparently agreed that we should try our best to reach the highest possible degree of uniformity.

In the field of contracts, the theoretical disputes are not ended, but a modern current of thought has increasingly taken shape. It is clearly visible in the book that we owe to Henri Batiffol, published in 1938, and it is with great pleasure that I state the fundamental identity of our methods, despite some striking divergencies in their application.[1] The conflicts rules on sales of goods, of the 1931 international committee, which were brought to your attention two weeks ago,[2] have been the first fruit of this rising doctrine. Many more are ripening. Speaking of contracts, we may directly attain uniform, adequate, and practicable rules, because the basic economic types of transactions are essentially the same throughout the so-called capitalistic systems. The outlines of these rules are simple.

If we want universal certainty, two general principles are indispensable:

(1) The parties are entitled to agree in contracting on the law applicable to their contract, and this with entire freedom; otherwise, the parties would go devious ways where no law can catch them, and at the same time the most effective honest means to reach predictable certainty would be destroyed. This has been fully understood by the bulk of judicial authority in mercantile countries cultivating world trade, such as England, Germany, Switzerland, Sweden, and also France.

The same view is maintained as against the usual doctrinal objections in the just-mentioned draft of conflicts rules for sales. The relevant observations in the excellent report by Professor Julliot de la Morandière deserve attention:

> The freedom accorded to the parties is as wide as possible in respect of the laws among which the choice of the parties may be exercised. Limitations could have been considered in this respect: some proposed that the choice should be restricted to the laws of the member states of the Convention, in order that a state should not be forced, by the will of the parties, to apply in its territory the law of a state which has failed to adhere to the treaty and of which reciprocity is not to be expected; others demanded that the parties should not be able to indicate whatever law they fancy, but only the law of a country interested in the contract (law of the place of contracting, of the place of performance, of the countries where the parties have

[1] Batiffol, Les conflits de lois en matière de contrats (1938). Our main disagreement, apparent in the present volume, concerns the freedom of choice of law by the parties; another involves his recommendation of the law of the place of performance as a general principle.

[2] *Supra* 45–47.

their residence or of which they are nationals, et cetera). These various suggestions have been discarded. . . . In the interest of the merchants, they should not have to be concerned at every moment about the list of states which have ratified the Convention; even in the commercial relations between two signatory states, it may be useful to adopt the rules of another state which has not adhered to the Convention, because these rules are good in themselves and sometimes even may serve as advantageous models. Every limitation of this character might, at a given moment, be disastrous and harm the very interest of commerce and the signatory states. The same would be the case if one sought to provide beforehand which laws might have connection with the contract: any enumeration risks being incomplete; modern commercial forms are essentially varied and variable. In numerous contracts it is unknown what will be the country of performance, the country of destination, even the country where the goods are situated; again, any limitation would run the risk, for purely theoretical reasons, of greatly embarrassing private activity. Fraud is feared; but if in a specific case, it appears that the choice of the parties is merely fictitious and has been dictated only by the desire to evade the application of some provision of the law which in reality applies to the contract, the court can always declare the simulation and, if need be, resort to public policy and refuse to give effect to the expressed intention.[3]

We are not speaking of submission to foreign jurisdiction; but even this much debated question has lost most of its importance by the advance of commercial arbitration.

(2) In the absence of an express or tacit agreement of the parties on the applicable law, we definitely have to abandon the ancient scholastic tests, such as the law of the place of contracting or the law of the place of performance. These places may be significant, but only in combination with other criteria. The English theory of the proper law has been improved in the true meaning of Savigny and Westlake: where there is no agreement, no presumed or implied intention of the parties controls, but the objective nearness of the contract to a certain territory or law decides which law will govern. This constitutes a sound subsidiary general rule, expressly applied by the Swiss Federal Tribunal: the law of that state governs to which the contract by its prevalent or most characteristic and distinctive feature has the closest connection.

This general rule requires a judicial method of individualizing the prevailing territorial connection of the individual contract. We cannot do without such a rule. But it is not true that this suffices. We need such a rule for contracts of unusual types or products of particular legal inventiveness. But if we left it to the court in every case to ponder all circumstances and

[3] Réunion du Comité Spécial, Conférence de La Haye de Droit International Privé, 28 mai–2 juin, 1931. Rapport présenté par M. Julliot de la Morandière au nom du Comité spécialement chargé de préparer un projet de Convention sur la Vente. (Unpublished—my translation.)

to select the applicable law from two to six candidates, the results in the United States and in most countries would not be edifying. Not very many judges are familiar with the finesses of conflicts law. They simply do not have the time for such research. They would either fall back on the mechanical rules, or find that their domestic law is closest to the contract. Embarking on the quest for special rules, however, we encounter the giant interrogation marks mentioned before.

First, we too often have heard it said, even in 1949, that it is impossible to have uniform conflicts rules. This is a dictum to be classified with the categorical judgments of the great Greek philosophers asserting that the earth cannot move. Why impossible? Presumably at bottom, there is still the positivism and legalism that prompted the well-known theories of Kahn and Bartin in international private law; each part of the system of the forum pursues the same policy and operates by the same technical apparatus as the private, or administrative or procedural, law of the forum. The differences of the national systems, consequently, are mirrored in the different conflicts laws. Walter Burckhardt finally has been the perfect logician, stringently concluding that a harmonious international private law *cannot* exist.

Now, what was all this but an agglomeration of gratuitous assertions? Why should a state, seeing that divorce laws differ widely, not have a policy of its own for domestic divorce and recognize all divorces rendered legally at the matrimonial domicil? Indeed, this is so done! The undeserved appearance of solidity in this cobweb of reasoning has been helped by Savigny's long accepted idea that conflicts rules deal with legal relationships, such as sales contracts, carriage contracts, succession, which are modeled by a positive legal body—naturally the *lex fori*. Yet, on the contrary, the conflicts rule has the task of determining the applicable law for factual situations, *legally not impregnated*,—such as, a man promising to give his car in exchange for one thousand dollars; a mate accepting for a vessel goods for transportation against the promise of payment; a deceased's assets and debts going to living persons—situations usual in all the world. If a conflicts rule insists exclusively on the local idea of a bill of lading, of conditional sales, or of corporate power, it leads nowhere. The analogous facts, the similar interests, the identical problem of legislative interference or construction, form the *tertium comparationis*, the common ground for a common rule predicating which law of two or three should furnish the substantive decision.

That this can be done, may perhaps be shown by the appended tentative draft submitted to you on the basis of comparative research. You may easily

correct or complete these skeleton rules. But what is impossible in these rules? Even family law can be treated without excessive difficulty.

Second, if uniform rules are possible, are they not desirable? I could more easily understand that automobiles must be built in different types for Michigan and Ohio, or that certain Russian symphonic works are digestible exclusively in Russia. Yet, it is true, belief in unregulated, unhampered sovereignty will linger for a long time in many minds. *This* is the potent reason for the reluctance to develop international law, either public or private. Reading the most recent work of Professor Niboyet, we find an extreme system of a purely French conflicts law which purports to serve primarily French national interests and regards French nationality as the most decisive factor. This system, once developed by a solitary writer, Le Comte de Vareilles-Sommières, is now proclaimed by Niboyet in a passionate outburst of forceful conviction. I cannot get over the following example of a French yardstick applied to the entire world, characteristic, although it does not involve an obligatory contract:

> A Russian married couple in their forties adopted in Russia in 1912 a Russian child of twelve years. The Court of Appeals of Paris declared that this Russian adoption had no force in a French inheritance, because the French Code, article 343, in 1912 required that the adopter should be fifty years old and the adopted person be of full age. But the court felt relieved; it was now 1936, and the French provision had been changed to forty years for the adopter with fifteen years difference in age. Therefore, the child obtained judgment.[4]

True, the succession was subject to French law, but this is a weak excuse for invalidating a Russian adoption because of the French law of adoption.

Conflicts law has attracted remarkable men, thinkers in ivory towers. If they are idealistic dreamers and penetrating workers at the same time, like Niboyet's deserted teacher, Pillet, or Zitelmann, the law advances. If the outstanding authors encourage the courts to follow the easy way of parochial arrogance, danger is imminent.

Even the familiar invocation of public policy is a potential assassin of conflicts law. It still haunts an unlimited domain, making irregular and unpredictable appearances in the courts of all countries. Theory has not even been able to categorize the activities of this *vieillard terrible*. The United States may take pride in the remarkably small number of decisions yielding unjustifiably to domestic prejudice. That we must distinguish the legiti-

[4] Cour Paris (Jan. 2, 1936) Gaz. Pal. 1936.1.551; criticized by Batiffol, Revue critique de droit international 1937, 419 at 427; Rabel, 1 The Conflict of Laws (1945) 647; but approved by Niboyet, 3 Traité de droit international privé français (1944) 537.

mate and necessary observance of the domestic public law (constitution, administration of justice, administrative law, taxation, et cetera) in respect of which the applicability of a foreign law must be rejected as intolerable, may only be mentioned to avoid misunderstanding.

Take away that feeling of superiority of which Judge Beach spoke, and you will not retain much of the entire exception of public policy. Under the perspective of a wholesome co-operation, even the delicate border lines of illicit bargaining should be envisaged without provincialism.

The German law treats the order of a person domiciled in Germany to a stockbroker in New York, valid under New York law, as wager if effective delivery or reception was not intended; the Seine Tribunal applied the French restriction to horse-race betting to the exercise of a license of the Hungarian Jockey Club; and the Supreme Court of Illinois rejected the claim of an innocent indorsee of a Missouri note issued because of a speculation upon future grain prices, although the indorsee would have a valid claim under the severe Missouri law itself.[5]

In the field of *contracts*, there is no reason in the world why a court, considering a case governed by foreign law, should inject into the case a public policy of its own statutes, except its public *law*, that is, constitutional, administrative, fiscal, penal, et cetera laws, and the *basic* conceptions of morality. We should not throw contracts and family law together. At least, contracts must be freed from the ubiquitous threat of unknown and incompetent statutes, which happen to be in force at the forum and for the forum.

The submitted text of a rule concerning public policy is not identical with the current formulas. It excludes strictly such decisions as those mentioned above, or the German decision that a penal stipulation in a foreign contract can be mitigated according to the German Code.

Although the invocation of public policy and the many concealed ways for preferring domestic law have been disapproved by the great majority of writers, our entire accustomed method of solving conflicts problems has been challenged by a few scholars. By spontaneous coincidence, a German attorney and a Dutch professor, Hijmans,[6] have suggested that instead of selecting one or the other of several systems of law, judicial power should create new substantive rules out of these systems to reach a good decision

[5] Rabel, 2 The Conflict of Laws (1947) 569, 570, 575.

[6] Fränkel, "Der Irrgarten des internationalen Privatrechts," 4 Zeitschrift für ausländisches und internationales Privatrecht (1930) 239 at 241; Hijmans, Algemeene problemen van internationaal privaatrecht (1937) 19 f., 61 ff. Earlier, connected ideas were expressed by Jitta, La méthode du droit international privé (1890) 200 ff., and Kollewijn, Het beginsel der openbare orde in het internationaal privaatrecht (1917) 74 ff.

of the case at bar. In this country, Professor Cavers has suggested that the court should select, from the laws connected with the cause of action, the law allowing the most satisfactory result; new rules of conflicts would thus originate by the method of trial and error.[7] Whether Professor Cavers maintains this version of a just result and how far Professor Harper goes in the same direction,[8] I cannot say. Their articles, at any rate, have given me much to think about; they lead to the bottom of the conflicts problem.

The problem has already been examined by the Germans, Wengler, Dölle, and Zweigert,[9] and especially by the Italian, De Nova,[10] all agreeing that, desirable as harmony of decisions at the forum in domestic and foreign matters may appear, harmony of domestic and foreign decisions on choice of law is much more important. I may shortly refer to their arguments. If we really put first a "just result," that is, a final outcome of a lawsuit which seems convenient in the eyes of the court seized of the case, irrespective of correct and consistent choice of law, the conflicts rules, if any should emerge at all, would be made infinitely more complicated and uncertain; would become innumerable; would tremendously reduce the application of foreign law, because the judges would easily find their domestic law the most satisfactory in the world; and, after all, if a "just result" in the issue at bar is the main goal, De Nova asks, why not permit the court to choose any law on the globe?

What interests us most, in view of the American discussions of law and court, to which Cavers and Harper have contributed so much, is the quest for the *just result* in itself. What kind of justice is to be sought in conflicts law? The problem is the more interesting in this country since the courts have in fact in certain circumstances reversed the ordinary choice of law in order to reach a preferred result.

Contrary to the opponents who scarcely ever give a full illustration, may I comment on a few examples rather than deliver a theoretical exposition?

i) A sale is contracted orally in New York between persons domiciled there. No doubt New York law governs. (a) The object is a painting;

[7] Cavers, "A Critique of the Choice-of-Law Problem," 47 Harv. L. Rev. (1933) 173.

[8] Harper, "Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays," 56 Yale L. J. (1947) 1153 at 1176.

[9] Wengler, 33 Zeitschrift für öffentliches Recht (1944) at 490 f., 499 f.; Dölle, Deutsche Rechts-Zeitschrift, Beiheft No. 5 (1948) 5; Zweigert, Festschrift für Leo Raape zu seinem siebzigsten Geburtstag 14. Juni 1948 (1948) 35 at 50.

[10] De Nova, Soluzione del conflitto di leggi e regolamento confacente del rapporto internazionale, Studi ghisleriana, Ser. 1, No. 5 (Pavia 1947).

the price is $80; the sale is unenforceable since the statute of frauds of New York operates on values above $50; and the buyer, now in Ann Arbor, refuses payment. Will a court in Michigan say: "In Michigan the limit is $100, hence the contract is valid"? We have never heard of such a public policy. But is it "just" that a man domiciled in Michigan should be better off than if he had bought in Michigan? Is it just at all that a New York contract should be treated differently from a perfectly analogous Michigan contract? We say yes, it is just, this is the natural effect of New York and Michigan being equally sovereign, although it would not be just to differentiate between Michigan contracts. (b) Now let the contract provide that the painting should be delivered in Ann Arbor. Should the Michigan court seize this opportunity to reverse the choice of law, adopt the law of the place of performance, and declare the contract binding? Note, please, courts have done this, in order to repudiate the unpopular formalities of the statute of frauds, where they can. However, a Michigan court (with the domestic limit of $100) would not invalidate an Illinois sales contract for a refrigerator priced at $400, which is valid there, although the object may be deliverable in Michigan. Hence, if we took those irregular decisions as proof of what is just in conflicts law, we would become confused indeed. You do not obtain *consistent* solutions unless you agree on a *certain* law to be applied. A law without consistency is no law.

(ii) A principal is established in X and there appoints A his sales agent. Under the law of X, a traveling salesman authorized to make contracts is not empowered, without special clauses in his power of attorney, to modify the printed sales conditions (for example, insert a warranty) or to collect the price. A was sent to Y where the law allows him to collect the price, and did so. Courts in the United States, Germany, Switzerland, and probably England, apply the law of Y. But is this *just* against P, whose interest seemed so well protected in X, where the power also was given, written, and delivered? It is! For if the principal has consented to the agent's activity in Y, Y's law should control in the interest of third parties. The laws of X and Y have different ideas of justice, different policies in weighing the respective interests. In the conflict of state competences, we need not decide also the conflict of these policies. We do have a policy, but on a different level. We think it is sound that the public in England, dealing with a foreign business agent, actually sent by the principal to England to make sales, should be treated on the basis of the English interpretation of his authorization. We prefer an opposite policy in the case where a guardian, an administrator, or the president or treasurer of a corporation, acts in foreign states. In this case, third persons are charged with notice of the

extent of powers granted by the charter, by-laws, or the statutes of the home state of the corporation.

Only the question whether *this* policy is sound, is a question of conflicts law; on this, I think one doubt only arises: Suppose that the law of X permits an authorized sales agent to modify printed sales conditions, to cash, defer the time of payment, receive notice of defects et cetera, and the law of Y does *not*; should X law prevail for the benefit of the third party, or should the third party have an option to accept or reject the contract as it stands under Y law?

My own answer is that no such benefit or option should be granted, because this would be going too far for the accommodation of the innocent third party and no longer be a "just" divide between the two interests at stake. An option, moreover, would make a gambling license out of a conflicts rule.

But a division of opinion is possible especially in matters of family law, to which a short excursion may be permitted. Professor Taintor[11] thinks that where the father of an illegitimate child has his domicil in X and the child is in Y, the law of the state more favorable to the child should obtain. To be legitimate, always would be deemed more favorable to it. Now, with all regard for innocent children, should not the applicable law itself decide which interest is more important and what compromises between the interests involved are adequate? French law emphasizes "the honor and tranquility" of the legitimate family. The German Code denies alimony if the mother has had intercourse during the critical period with someone other than the defendant. The Norwegians permit recovery of alimony from those several persons who cannot all be the father. And Soviet Russia, North Dakota, and Arizona have abolished the entire discrimination between legitimate and illegitimate children.

Conflicts law cannot aspire to be the judge between these very different attempts to solve a desperate problem and, for instance, prefer the law of the defendant, if he is a Norwegian, and that of the child, if the defendant is a Frenchman. The public policy of some forum may reject as horrible a foreign provision that adulterine children may not be recognized or legitimated, but a court should not shop around for a more favorable law, irrespective of the conflicts rule. There could be retaliation! In the international scene indecision is as harmful as preference for the national policy.

The American interstate situation is different insofar as social progress in the law is reached successively in the forty-eight states, whereas the national personal and business life is increasingly standardized. When once

[11] Taintor, book review, 32 Va. L. Rev. (1946) 684, at 689.

the contractual capacity of married women was conceded at intervals in one state after the other, when the common law conceptions of bastardy, fellow servant, contributory negligence, *ultra vires*, or the broad scope of procedural law, have been overcome in some states and not, or partly not, in others—in all such subjects, a badly concealed judicial partiality for the law of the more advanced statute assumed the function of favoring a national trend. Again, when courts silently reject the statute of frauds, the prohibition of sales of intoxicating liquor and of Sunday contracts, they seek to protect interstate commerce. Similarly, they desire to uphold interstate financing, when they look to the most lenient usury statute connected with the case. In all these and other vacillations, the feeling is paramount that the coherence of the highly unified nation is more important than local sovereignties. This is a phenomenon far removed from our essential conflicts problems.

Of course, I have distinct sympathy with a conscientious judge forced to apply a law which he believes to be bad, and which, for good measure, is also a foreign law. But more often than not, he may find an escape without sacrificing conflicts law.

Conflicts law, after all, should pursue its traditional purpose of delimiting the competence of the states. Doing this consistently in the same court and in all courts, we do best justice to interstate and international relations. The task is not extravagant: it is possible. Neither is it too modest: it transcends the conflicts of private laws. American constitutional construction is searching for new criteria. International taxation has the very same needs. Sound, realistic and universal rules of conflict for private contracts and property necessarily will bestow more harmony upon even more important relations.

APPENDIX

Some Tentative Conflicts Rules on Contracts

A. General Rules

1. Party Choice of Law[1]

The parties of a contract having essential connections with more than one state may agree on the law applicable to the entire contract or to special parts thereof.

2. Subsidiary General Rule

(1) In the absence of agreement of the parties on the applicable law, the contract is governed by the law of the state with which the contract has its most distinctive connection.

(2) This subsidiary general rule applies to factual situations differing from

[1] See *supra* n. 3, and Rabel, 2 The Conflict of Laws (1947) 427.

those subject to special rules, as defined below.

3. Scope of the Rule

(1) The law applicable to the contract covers all requirements and effects of the contract, including form, capacity, consent, rights, duties, and (except as stated in Section 4) performance.

(2) For the formal validity of a contract, however, it suffices that the requirements of the law of the place of the parties or their agents concluding the contract are fulfilled. In the case of contracts by correspondence or telephone, it suffices that the formalities required at the place (see *infra* Section 6) of the party solely obligated, or that of either party to a bilateral contract, are satisfied.[2]

(3) Likewise, it is sufficient that a contracting party have full capacity by the law of his domicil.[3]

4. Modalities of Performance[4]

(1) Insofar as the modalities of performance are not prescribed by the contract, they are regulated by the law and customs of the place where a contractual duty is to be performed.

(2) In particular, this includes the manner of tender, hours of the day or days of the week for making a payment, protest, or other necessary act, the units of currency having legal tender, and the question whether a sum stated in foreign money may or must be paid in a corresponding sum of the local currency.

(3) The law of the place of performance, however, has no extraterritorial effect on the amount in money due under the contract or on the legality of the obligation.[5]

5. Public Law and Policy[6]

(1) A court may refuse to apply foreign law on the ground that its application is contrary to domestic public law within its proper territorial sphere or repugnant to the basic moral conceptions of the forum.

(2) Public law includes constitutional, administrative, procedural, and fiscal law, but not provisions protecting the interests of persons in private relations.

6. "Place" of a Party[7]

(1) The "place" of a party is his business place or in default thereof, his habitual residence.

(2) If a party to a contract has several places of business or habitual residences, that at which he makes or from which he sends his first offer or reply to an offer is considered his place.

(3) If a contracting party is represented by an agent acting in the name or on behalf of the party, the place of the principal is decisive. If the agent acts in his own name, the place of the agent prevails.

[2] See *id.* at 516.

[3] See Rabel, 1 *op. cit.* (1945) 193, 195, and Cheshire, International Contracts (1948) 57.

[4] Rabel, 2 *op. cit.* 464.

[5] Rabel, 3 *op. cit.* (1950) 51.

[6] Rabel, 2 *op. cit.* Ch. 33.

[7] See Draft, Uniform Law on International Sales of Goods, by the International Institute for the Unification of Private Law (1939) art. 9; Rabel, 3 *op.cit.* 70.

B. Special Typical Connections

In the typical cases indicated hereafter, that is, where a contract is not essentially characterized by circumstances other than those here indicated, the following conflicts rules should prevail unless the parties have agreed on the applicable law.

7. Contracting within the State of the Parties[8]

(1) Where the places of both parties are in one state and all their acts forming the contract take place within the same state, the law of this state governs the contract.

(2) This rule prevails over all other special rules.

8. Contracts Relating to Land[9]

(1) Contracts obligating a party to create, transfer, or modify interests in land are governed by the law of the state where the land is.

(2) This provision includes leases of such interests, whether or not deemed to confer real rights.

9. Bank and Customer[10]

A contract of a bank with a private customer is governed by the law of the place of the branch where the customer's regular account is kept.

10. Bondholder's Rights[11]

(1) The rights of individual holders of bonds in a single issue are governed by the same law.

(2) Bonds belong to the same issue, even though interest and the principal sum, expressed in a certain currency, are declared collectible, at the option of the holder, in another currency according to computation at an exchange rate.

(3) A bond issue is governed by the law of the place of the financial market for which the issue is primarily made.

11. Sales of Goods[12]

(1) Sales of goods are governed by the law of the place of the seller.

(2) But the law of the place of the buyer applies to sales of goods to be tendered in the state of the place of the buyer, or within a continent other than that of the seller. For this purpose, Anglo-America and Latin America are considered different continents.

(3) The manner and time of examining the goods and giving notice of defects of quality or quantity, as well as the measures to be taken in case of rejection of the goods, are determined by the law and usages of the place where the contract provides that the goods are to be examined. The same law determines the effect of omitting notice, in the absence of a rule of the law of the contract.[13]

12. Agent's Authorization by Office[14]

If an agent is authorized by law, or by a court, or other public authority

[8] See Rabel, 2 *op. cit.* 461, and 3 *op. cit.* 53.

[9] It is specially recalled that those are not compulsory rules as the *lex situs* is for transactions creating, transferring, or modifying interests in land.

[10] Rabel, 3 *op. cit.* 16, 473.

[11] *Id.* at 11, 31, 33.

[12] *Id.* at 67; *supra* 44.

[13] Rabel, 3 *op. cit.* 92 ff.

[14] *Id.* at 148, and *supra* 84.

according to law, third parties with whom the agent transacts are charged with notice of such law. This provision includes the authorization of the principal officers of a corporation, determined by its charter or by-laws, as well as that of trustees, guardians, administrators, and other representatives of estates.

13. Voluntary Private Authorization[15]

(1) Existence and scope of an authorization by private voluntary act, if the agent carries on his function from a fixed place of business, is governed by the law of this place.

(2) In all other cases, the law of the place in which the agent manifests (by express declaration or by conduct) his consent to the main transaction, governs.

14. Independent Agents and Exclusive Sales Agreements[16]

Contracts of exporters or importers with foreign independent firms for exclusive sales arrangements and contracts entered into with members of a profession (attorneys, physicians, architects, brokers, commissioners, et cetera) are governed by the law of the place of the person rendering the services contracted for.

15. Employment of Servants[17]

Contracts for dependent services are governed by the law of the place to which the employee is to be attached, or in the absence of such, the place of the employer's central management.

16. Carriage[18]

Contracts for transportation of persons or goods are governed by the law of the place where the transportation is to begin, except that maritime and air transportation of persons are governed by the law of the home state of the vehicle.

17. Documents of Title[19]

The obligations created by documents of title, such as bills of lading, warehouse receipts, dock warrants, or delivery orders, are governed by the law of the place where such documents are issued.

The requisites and effects of an endorsement are governed by the law of the place where it is made.

Note. This rule does not control the operation of such documents in the transfer of title.

18. Insurance of Tangible Things[20]

Contracts of insurance for risks relating to tangible things (insurance against fire, crop damage, accident to automobiles, glass, machines, et cetera) are governed by the law of the state where the things have a fixed situation at the time when the policy is delivered.

[15] Rabel, 3 *op. cit.* 165, and *supra* 85.
[16] Rabel, 3 *op. cit.* 194, and *supra* 87.
[17] Rabel, 3 *op. cit.* 188, and *supra* 87.
[18] Rabel, 3 *op. cit.* 268, 293, 298, 307.
[19] *Id.* at 273 ff.
[20] *Id.* at 341.

19. Guaranty[21]

Suretyship and all other kinds of guaranty are governed by the law governing the principal debt, unless the guaranty implies essential modifications of the conditions of the principal debt.

20. Special Assignment[22]

(1) A promise of assignment and an actual assignment of an obligatory claim are governed by the law of the place of the assignor, provided that the law governing the debt permits replacement of the creditor by the assignee.

(2) The law governing the debt determines the obligation of the debtor.

(3) The law of the place of the debtor, however, determines whether and in what manner notice of the assignment must be given the debtor for the purpose of enforcing the claim against him.

21. Lapse of Time[23]

Statutory limitations of action and all other restrictions on an obligation by lapse of time are governed by the same law governing the obligation.

Note. It is advocated that the "borrowing statutes" of American states should be replaced by a statute simply adopting this rule. So long as such amendment is not in effect, common law jurisdictions will continue in principle to prefer the statute of limitations of the forum to the statutes of other common law states, but should nevertheless apply the limitations of other foreign laws without differentiating between kinds of time restriction.

[21] *Id.* at 352.
[22] *Id.* at 433.
[23] *Id.* at 521.