

CHAPTER 2

Structure of Conflicts Rules

I. THE PARTS OF THE RULE

INTELLIGENT application or development of conflicts rules requires full awareness of the two parts of which these rules are necessarily composed. Thus, although it need not exactly conform to the example, a typical conflicts rule runs as, for instance, section 295 of the Restatement:

(1) The validity of a trust of movables created by a will (2) is determined by the law of the testator's domicile at the time of his death. (Numbers added.)

The first part of the rule defines its object, that is, certain operative facts,¹ the legal consequences of which are determined in the second part. From another point of view the first part raises, and the second part answers, a legal question. In comparison with ordinary legal rules, there is one, a fundamental, difference. The legal effects of an ordinary rule of law are fully indicated; the question raised is immediately solved by commanding or prohibiting or authorizing certain conduct. ("Material," "substantive," "internal" rules, in German, *Sachnormen*.) In contrast, conflicts rules decide only which state shall give such immediate solution. The specific quality of these rules resides therefore in the second part that declares the municipal law to which the question should be referred or "connected" (in German, *angeknüpft*) or, in other words, precribes the legislative domain in which the question should be "localized." (There is no point in arguing which mode of thinking represented by these expressions is prefer-

¹ German: "Tatbestand," translated by LEA MERIGGI, *Revue* 1933, 201 at 205, n. 1, into Latin: "substratum" (subject matter); Italian: "presupposto" (premise).

able.) An essential element of conflicts rules, therefore, is the indication of a "connecting factor" or "point of contact" (*Anknüpfungspunkt, point de rattachement*)²—the testator's domicile as of the time of death in the case above, or in other cases the situs of property, the place where a contract was concluded or where it is to be performed, etc. In this line of thought, the facts localized by the connecting factor appear separately as the "thing connected." In the example above, these facts form the first part of the rule, while the connecting factor appears in the second part. For the sake of simplicity, we shall continue to conceive of the rule in the manner stated, although, in some conflicts rules, the localizing elements or some of them, are inserted in the first part.

Strangely enough, the misfortunes of the doctrine taken over from the nineteenth century have been caused largely by insufficient attention to this nature of the conflicts rules. As will be seen hereafter, the parallelism of the first part with substantive rules was overlooked, and the basic peculiarity in the second part was not consistently appreciated.

Part of the confusion lay in the traditional notion of "the law of the forum." *Lex fori* once meant the entire set of legal rules in force at the place of suit. In a system of pure territorialism, every tribunal either applies its own law as a whole or dismisses a case found to belong to a foreign jurisdiction. There is no choice of law, no application of foreign law in such a system—a system which was observed in England with more consistency than anywhere else and is still represented in many conceptions of Anglo-American law. If the entire "law of the forum" be considered a unit, conflicts rules are in effect integrated with the internal law. But when assumption

² Term introduced by KAHN, *cf.* NEUMEYER, 3 *Z.ausl.PR.* (1929) 261, translated as point of contact by LORENZEN, and as connecting factor by FALCONBRIDGE. For recent discussion, see FALCONBRIDGE, "Characterization in the Conflict of Laws," 53 *Law Q. Rev.* (1937) 235, 537 at 549. CORMACK, "Renvoi, Characterization, Localization and Preliminary Question in Conflict of Laws," 14 *So. Cal. L. Rev.* (1941) at 241, "localization."

of jurisdiction no longer implies application of the domestic rules and there exist choice of law rules, the latter must live apart from the internal set of rules. At this stage of development, appropriate language can designate as law of the forum only the pure internal law, strictly excluding conflicts rules.

Likewise, the extensive recent discussion, under the French catchword of "qualification,"³ of the nature and function of the law of conflicts has been a source of difficulty. BARTIN, the author of this expression, assumed that conflicts rules are an inseparable part of the law of the forum⁴ and that, accordingly, the legal terms used in a conflicts rule must by logical necessity be explained ("qualified") in terms of the peculiar concepts of the *lex fori*. Had it not been for this theory, characterization would never have attained the role it occupies in the present literature. In fact, as that theory has suffered increasing exceptions and modifications, the term qualification has become uncertain. The writers argue which characterization problems are genuine and which false and even whether characterization is of immense or minimal significance. Such terminological disputes should be ended.

The real subject of the basic debate about conflicts law is the interpretation of the rules of conflicts. This is essentially broader than commenting on expressions. Moreover, it furnishes a clearer objective than does reference to some substantive law, for evidently conflicts rules have to be interpreted by exploring their own meaning rather than the meaning of something else, e.g., an internal rule. Emphasis should be shifted from "characterization" to "interpretation."

³ While KAHN spoke of "latent conflicts of law," BARTIN's term "qualification" became usual in Europe. BECKETT and CHESHIRE translate it by "classification," FALCONBRIDGE proposed "characterization" and is generally followed. See FALCONBRIDGE, 53 *Law Q. Rev.* (1937) 235 at 239, *supra* n. 2. For another survey, see VAN PRAAG, "Bijdrage tot de leer der kwalifikaties in het internationaal privaatrecht," *Rechtsgeleerd Magazijn Themis* 1939, 525.

⁴ See *infra* n. 9.

If nevertheless characterization is to retain a technical meaning, it may be used to denote the problem whether or not a certain expression in a conflicts rule has the same connotation as a similar word employed by domestic law or in a foreign system.⁵ Characterization of facts as such is not significant of conflicts law.

The most important objective in interpreting a conflicts rule is to determine its scope. The borderline, for instance, delimiting the cases for which the conflicts rule on contracts prescribes the applicable law from those subject to the conflicts rule concerning torts, must be marked in every conflicts system. This process may be termed *classification* in the proper sense.

II. THE FIRST PART: THE OBJECT OF THE RULE

The statist doctrine classified each *substantive rule* of positive law in one of three categories, territorial law (*statuta realia*), extraterritorial law (*statuta personalia*), and "mixed statutes" (*statuta mixta*), the last-named category being assimilated to the first by the late French and the Dutch school. Thus, in the statist conception, the object of conflicts law is the substantive rule of law. The substitution for this of the legal relations between persons or of persons to things by Savigny constitutes the chief advance from this to the modern conception. Savigny and his followers, who apparently are still numerous, therefore deemed it to be the characteristic task of conflicts law to connect each single "legal relation" with a certain country.

This conception, despite its advantages, still was not quite correct. Its consequences, as later deduced by Franz Kahn, demonstrate that the mistake was not harmless. The starting point of analysis, as should be obvious, ought not to be the

⁵ RABEL, 5 Z.ausl. PR. (1931) 253.

legal relation, e.g., an obligation, a property right, the relation between spouses. Any such relation must be based on a determinate legal system. Which system, when the applicable law is not even yet contemplated? At this stage, there is nothing but a factual or "social" situation.⁶ If two persons of Greek Orthodox faith go through a marriage ceremony before a Greek Orthodox priest in Paris, is this a marriage? The answer depends on what law we apply: the law of the forum, the French law, the Greek law, or perchance some other law. No court except in Greece, however, would actually apply its own internal law to the question. Nevertheless, Kahn and the many who share his view assume that the legal relationship of marriage as constituted under the domestic law of the forum is exclusively the object of the conflicts rule. This makes no sense; it is simply a way out of embarrassment in order to find some legislation containing the allegedly necessary definition of such object. Evidently, conflicts rules must operate as do all other rules, directly on the facts of life, not on a legally predicated, abstract subject matter. They refer to merely factual events, such as the marriage ceremony before the Greek priest, a document concerning the sale of a movable, a declaration by a married woman, purporting to transfer property, the death of an individual leaving no will, *et cetera*.

This statement is of cardinal significance; it ends all speculation about the necessary dependence of conflicts rules on some legal system, whether the law of the forum or the

⁶ RABEL, 5 *Z.ausl.PR.* (1931) at 243; reproduced in *Revue* 1933, 1 at 5 ff., followed by NEUNER, *Der Sinn* (1932); M. WOLFF, *IPR.* 1; DE CASTRO, "La cuestión de las calificaciones en el derecho internacional privado," 20 *Revista Der. Priv.* (1933) 217 at 240, 265 at 280, 282; VALLINDAS, *Book Review*, 1 *Archeion Idiotikou Dikaiou* (1934) 176; MEZGER, *Decision Note*, *Revue Crit.* 1935, 447; 1 *STREIT-VALLINDAS* (1937) 243; FALCONBRIDGE, 53 *Law Q. Rev.* (1937) 235 at 242, *supra* n. 2; ROBERTSON, *Characterization* 63; HUSSERL, "Foreign Fact Element in Conflict of Laws," part II, 26 *Va. L. Rev.* (1940) 453 at 471. More precisely, the object has been described as a factual situation taken *in abstracto*; see MERIGGI, *Revue* 1933, 205, or as the facts underlying the relation which is mentioned by the conflicts rule and taken *in abstracto*, see NEUNER, "Die Anknüpfung im internationalen Privatrecht," 8 *Z.ausl.PR.* (1934) 81, 85. (Erroneous criticism by DE CASTRO, 20 *Revista Der. Priv.* (1933) 239, 241, *supra* this note.)

lex causae. This supposition was engendered by the short manner in which conflicts rules have been generally framed, as for example:

Immovables, even those possessed by foreigners, are governed by French law. The laws concerning the status and capacity of persons govern a Frenchman, even resident abroad. (French C.C. art. 3.)

Or, when the rules became more detailed:

The capacity of a person is to be determined according to the laws to which the person belongs. Personal relations between German spouses, even though domiciled abroad, are governed by the German laws. (German EG. art. 7 par. 1, art. 14 par. 1.)

Broad stretches of subject matter have thus customarily been indicated by abbreviated terms, seemingly corresponding to the captions of large chapters of private law, such as capacity, relation between spouses, inheritance, *et cetera*. But this is merely the technique of shorthand expression.

III. INTERPRETATION AND CHARACTERIZATION

No doubt such legal terms ordinarily have been taken from the headings used in the civil code or accepted legal classification of the forum. But was that always so, must it so remain; is the interpretation of such a term bound to its specific significance in the internal law?

1. *Lex Fori*

Franz Kahn,⁷ in his elaborate earlier opinion, which to a vaguely defined extent he later revoked,⁸ and BARTIN,⁹ who

⁷ KAHN, *Gesetzeskollisionen: ein Beitrag zur Lehre des internationalen Privatrechts* (1891) 1 Abhandl. 1, especially "Latente Gesetzeskollisionen" at 92.

⁸ KAHN, *Über Inhalt, Natur und Methode des internationalen Privatrechts* (1899), 1 Abhandl. 255 at 312.

⁹ BARTIN, "De l'impossibilité d'arriver à la suppression définitive des conflits de lois," *Clunet* 1897, 225, 466, 720, reprinted in BARTIN, *Études* (1899) 1; BARTIN, 1 *Principes* (1930) 221; BARTIN, "La doctrine des qualifications et ses rapports avec le caractère national des règles du conflit des lois," 31 *Recueil* 1930 I 565.

first sponsored the theory, considered it a matter of course that when a conflicts rule speaks of domicile or marriage settlement or tort, it meant exactly what such expression signifies in the corresponding domestic law. This theory has had an immense following¹⁰ and has been adopted in the Restatement¹¹ and the *Código Bustamante*.¹² Logical as well as so-called practical arguments have been adduced in quantity to prove this assertion;¹³ they may now also be found reproduced in English¹⁴ and need no repetition.

2. *Lex Causae*

Another opinion went in the opposite direction; the terms or concepts of the conflicts rule should be understood according to the foreign internal law referred to by the conflicts rule itself. Originated by the French Despagnet, and recently revived by Pacchioni and M. Wolff,¹⁵ this theory has been

¹⁰ For lists see MELCHIOR 110 § 78; MAURY, "Règles générales des conflits de lois," 57 Recueil 1936 III 325 at 467. To mention the most significant names, in France: ARMINJON, H. DONNEDIEU DE VABRES, LEREBOURS-PIGEONNIÈRE, NIBOYET, SURVILLE, WEISS; in Belgium: Poullet, de Vos; in Germany: GUTZWILLER, LEWALD, MELCHIOR, NEUMEYER, NUSSBAUM, RAAPE, ZITELMANN; in Italy: ANZILOTTI, AGO, BUZZATI, CAVAGLIERI, FEDOZZI, PERASSI, SALVIOLI, UDINA; in the Netherlands: KOSTERS, MULDER.

More recently in Britain and the United States: CHESHIRE; LORENZEN, "The Theory of Qualification," 20 Col. L. Rev. (1920) 247; LORENZEN, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws," 50 Yale L. J. (1941) 743; FALCONBRIDGE, 53 Law Q. Rev. (1937) 245, *supra* n. 2; cf. "Renvoi, Characterization and Acquired Rights," 17 Can. Bar Rev. (1939) at 373; ROBERTSON, Characterization 24; CORMACK, Renvoi, 14 So. Cal. L. Rev. (1941) 221 at 223, *supra* n. 2.

¹¹ Restatement § 7.

¹² *Código Bustamante* art. 6. Also the Rumanian Draft of 1933, art. 66; cf. ANTONESCO, *Revue* 1933, 155 at 171.

¹³ See especially NIBOYET no. 416.

¹⁴ See BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) 46, esp. 53 ff.; ROBERTSON, Characterization 59.

¹⁵ DESPAGNET, "Des conflits de lois relatifs à la qualification des rapports juridiques," *Clunet* 1898, 253; DESPAGNET et DE BOECK, *Cours de droit international public* (ed. 4, 1910) no. 106 *bis*; M. WOLFF, *IPR*. 34 ff.; PACCHIONI, *Elementi* 167; partly also NEUNER, *Der Sinn*, and FRANKENSTEIN, "Tendances nouvelles du droit international privé," 33 Recueil 1930 III 245 at 313.

generally rejected.¹⁶ In the present writer's opinion, which is not here elaborated, the solutions sought by Wolff are acceptable in special circumstances, but not in principle.¹⁷

3. Comparative Method

A third opinion, which, in opposition to both these dogmas, advocates a method rather than a doctrine,¹⁸ was expounded by the present writer in 1929 and 1931.¹⁹ In this view, the factual situation, which is the true premise of any conflicts

¹⁶ For a resume of the almost general rejection, see MAURY, "Règles générales des conflits de lois," 57 Recueil 1936 III 325 at 484.

¹⁷ See *infra* p. 60.

¹⁸ Rightly MAURY, 57 Recueil 1936 III 325 at 477.

¹⁹ RABEL, 3 Z.ausl.PR. (1929) 752 at 755; RABEL, "Das Problem der Qualifikation," 5 Z.ausl.PR. (1931) 241, (in Italian) 2 Rivista Italiana (1932) 97, (in French) Revue 1933, 1.

In the same sense: in Belgium: WIGNY, Revue Crit. 1936, 392; England: BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) 46; France: J. DONNEDIEU DE VABRES 765; Germany: NEUNER, Der Sinn (1932); SILBERSCHMIDT, 48 Z.int.R. (1933-34) 313 at 334 and 54 Zentralblatt (1936) at 17; Italy: MERIGGI, "Saggio critico sulle qualificazioni," 2 Rivista Italiana (1932) 189, (in French) Revue 1933, 201, (in English) 14 B.U.L. Rev. (1934) 319; ZANCLA, Sede di fatto del rapporto, Atti dell'Accad. Pelorit. (1936) 18; Spain: DE CASTRO, 20 Revista Der. Priv. (1933) 240 at 245, *supra* n. 6 (in part divergent); Switzerland: WERNER NIEDERER, Die Frage der Qualifikation als Grundproblem des internationalen Privatrechts, in Zürcher Studien z. internat. Recht, no. 1 (Zürich, 1940); VON STEIGER, Die Bestimmung der Rechtsfrage im internationalen Privatrecht, Abhandlungen zum Schweizerischen Recht, 129 Heft, (Bern, 1937). (The Federal Tribunal has left the decision open; see BG. (Feb. 24, 1939) 65 BGE. II 66, 71; BG. (Oct. 30, 1940) 30 Praxis 63 no. 1, at 64). NEUNER and MERIGGI, however, add essential propositions of their own. Practical application of this method to particular problems has been made by WERNER VON SIMSON, Die materiellen Wirkungen des rechtskräftigen Urteils im internationalen Privatrecht (Thesis, Freiburg i.Br., 1935); H. P. ZSCHOKKE, Die Rechtsstellung internationaler Kartelle, Schweizerische Vereinigung für Internationales Recht, Druckschrift no. 35 (1936); HANS H. RIEMANN, Die Schuldverträge im internationalen Privatrecht (Dresden, 1939) v and 9.

United States: CHEATHAM, "Internal Law Distinctions in the Conflict of Laws," 21 Cornell L. Q. (1935) 570, warns against "two closely related practices" (p. 589), viz., (1) "the uncritical transfer to Conflict of Laws of the meaning given to a term in internal law," and (2) "the use of a distinction worked out in internal law as decision of an issue in Conflict of Laws without adequate consideration of whether the internal law distinction is appropriate to the other issue."

rule, must be referable indifferently to foreign as well as to domestic substantive law. Hence, if legal terms are used to describe this factual situation, they must be susceptible of interpretation with reference to foreign institutions, even those unknown to the *lex fori*. This operation includes comparative research. Thoughtful courts have always employed this method, but systematic efforts are needed gradually to free national conflicts rules from undue dependence on internal conceptions.

For example, the first theory above was resorted to in the English case, *Leroux v. Brown*,²⁰ in which the parties in France made a contract satisfying every condition of validity under French law. However, the action failed on the ground that the statute of frauds imposes a rule of procedure, which as such must be observed by all litigants in England. Consequently, the conflicts rule on "formalities" was deemed inapplicable. This decision has been severely criticized.²¹

Although the case conforms to the *lex fori* doctrine dominant in the United States, it has been generally disapproved by American courts and writers.²² Moreover, it appears that in this country foreign statutes of frauds are deemed to prescribe formalities as defined by the conflicts rule relating to formalities, though such statutes may be otherwise interpreted in the various jurisdictions for other purposes. This construction agrees with the third theory above.

The reason for this solution is obvious. It offends justice²³

²⁰ (1852) 12 C. B. 801.

²¹ See BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) at 69 § 18; CHESHIRE 248 and 636; FALCONBRIDGE, "Conflict of Laws: Examples of Characterization," 15 Can. Bar Rev. (1937) 220, 224, is doubtful, however.

²² *Straesser Arnold Co. v. Franklin Sugar Refining Co.* (1925) 8 F. (2d) 601; *Ohlendiek v. Schuler* (1929) 30 F. (2d) 5; *WILLISTON*, 2 Contracts § 600.

²³ See *Lams et ux. v. F. H. Smith Co.* (1935) 36 Del. 477, 178 Atl. 651, *Clunet* 1937, 873, *LORENZEN*, Cases (ed. 4, 1937) 458; *CHEATHAM*, Cases (ed. 2, 1941) 549; *LORENZEN*, "The Statute of Frauds and the Conflict of Laws," 32 Yale L. J. (1923) 311, 320; *GOODRICH* 207; 3 *BEALE* § 602.1.

to deny enforcement of an oral contract complying with local requirements of form, for the mere reason that the domestic law requires a memorandum in writing. Conversely, a contract unenforceable where executed, may be deemed to depend on such other contacts as the conflicts rule of the forum admits; thus, by the applicable conflicts rule, a contract may be considered valid under the law of the place of performance. But, if under the conflicts rule the transaction has no connection with the forum, it cannot be validated by the municipal law of the forum. The object of the conflicts rule on formality thus may include foreign statutes of frauds and exclude the domestic statute, irrespective of domestic classifications.

The prescriptions of the domestic statute of frauds indeed may be considered to relate to procedure in a court for the purpose of their application *ex officio*, irrespective of formal demand by a party, or to determine whether failure to observe the statute constitutes reviewable error, as well as to decide whether amendments thereof have retroactive effect. The purposes of conflicts law are different. In fact, the English writers seem to regret *Leroux v. Brown* only because of its implications for conflicts law. French²⁴ and German²⁵ courts classify provisions concerning oral agreements as formalities in all respects, and certainly not as procedure, the only doubt being whether they do not affect the substantive requisites of consent to a contract.

In consequence, an American, French, etc., court has to apply the English statute of frauds, or the special provision of section 4 of the British Sales of Goods Act, respectively, to an English transaction, in particular to an agreement to

²⁴ Cass. (reg.) (April 18, 1865) S.1865.1.317; Cass. (civ.) (June 29, 1922) D.1922.1.127, S.1923.1.249.

²⁵ Unanimous. For a foreign provision prescribing written contracts, see KG. (Oct. 25, 1927) JW.1929, 448, IPRspr. 1929, no. 7. See also the definition of formalities in art. 3 of the Geneva Convention of 1930 for the settlement of certain conflicts of law in connection with Bills of Exchange and Promissory Notes.

sell concluded in England. (That this is true, although the English courts reach the same result on procedural lines, in the case of English transactions, needs some comment in our later discussion.)²⁶

There is very little doubt, in fact, that conflicts law has its own denotation of formality, independent of either the *lex fori* or the *lex causae*.²⁷

Without resuming all arguments of the vivid controversy that went on during the last decade, it may be stated that the *lex fori* theory has visibly shrunk under the weight of the attacks to which it has been subjected. In the first place, there seems today little support for the once-pretended logical necessity of resorting to domestic notions, Niboyet's *argument de nécessité*. There still are die-hards,²⁸ it is true. While even Bartin conceded two "exceptions" to the principle of characterization according to the domestic ideas, some of his followers have insisted on its pure application. In particular, Bartin saw that the question whether foreign-situated property is movable or immovable, is almost universally decided according to the law of the situs and not to the *lex fori*.²⁹ This is clearly a sound rule and, thanks to its adoption throughout the world, an oasis of uniformity; but important writers have protested.³⁰ Franz Kahn diluted his own axiom even more; he states that a rule referring "parental power" or "tort" to some foreign law does not mean exclusively what the civil code of the forum means by such terms, but also includes "the corresponding and similar foreign notions." Only the "nucleus of the foreign institu-

²⁶ *Infra* p. 66.

²⁷ This problem will be treated in connection with the requirements for contracts.

²⁸ A climax was reached by RUNDSTEIN, "La structure du droit international privé et ses rapports avec le droit des gens," *Revue Dr. Int. (Bruxelles)* (1936) 314, 512, who declares any separate development of conflicts law "logically" impossible. *Contra*: BALOGH, 1 *Symmikta Streit* (1939) 88.

²⁹ This is now for BARTIN the "only true exception," 1 *Principes* 236.

³⁰ NIBOYET no. 418 and 2 *Répert.* 411 no. 27; KAHN, 1 *Abhandl.* 76; and others.

tion" must be similar, not the "technical envelope."³¹ For this acute thinker, a half-century since, the *lex fori* was not an infallible guide, but rather a signpost showing vaguely a direction.

At present, the advocates of the *lex fori* theory, conscious that the theory must be justified by convenience rather than logical necessity,³² are entangled in difficult efforts to avoid absurd results. They feel, for instance, free to concede that a concept such as contract or tort may have a much broader scope in conflicts law than in private law.³³ Again, the German conflicts rule (EG. art. 21) concerning the right of an unwed mother to claim support from the illegitimate father of her child, is strictly predicated upon a rule of the German Civil Code specifically granting such right; Raape recognizes this connection but nevertheless suggests the application of the rule to an essentially different claim under Norwegian law and to certain even more remote types of actions for damages under other laws.³⁴ For such analysis of the compass of conflicts rules, he employs comparative methods as a matter of course. Nussbaum, who on the contrary is a decided foe of comparative methods in the subject, yet applies the conflicts rules regarding wrongs to liabilities without fault, irrespective of the treatment in internal law, construes terms such as "company" or "corporation" "in the freest manner," and particu-

³¹ KAHN, 1 Abhandl. 112 (1891), generally followed up to 1931, although KAHN himself sensed the futility of this escape in 1899, see 1 Abhandl. 311; cf. RABEL, *Revue* 1933, 20, 24.

³² ROBERTSON, *Characterization* 74; LEWALD, *Règles générales des conflits de lois* 77.

³³ AGO, "Règles générales des conflits de lois," 58 *Recueil* 1936 IV 247 at 337; MAURY, "Règles générales des conflits de lois," 57 *Recueil* 1936 III 325 at 494; FEDOZZI 186. See also the criticism by PACCHIONI, *Elementi* 181. GUTZWILLER, also a follower of the *lex fori* theory, has seen that the Mixed Arbitral Tribunals have applied numerous general legal concepts of the civilized world, or of the civil law countries (see "Das Internationalprivatrecht der durch die Friedensverträge eingesetzten Gemischten Schiedsgerichtshöfe," 3 *Int. Jahrbuch f. Schiedsgerichtswesen* (1931) 123 at 149 ff.).

³⁴ RAAPE, 50 *Recueil* 1934 IV 401 at 452, 524.

larly recommends "flexible methods" and "broad" interpretation.³⁵ Maury³⁶ ends his apology for the *lex fori* with the following recipe:

One starts from the *lex fori*, from its concepts. But these concepts are adapted first to their international function and then enlarged by a comparison with those of the foreign laws. We approach the viewpoint of Mr. Rabel, but we do it rather modestly.

This dictum has been adopted by Robertson³⁷ with a qualification. He avows that

"some categories (of conflicts law) will be quite different from any category of the internal law, because designed to make provision for institutions of the foreign law not known to the internal law of the forum."

Such independent categories, he confesses,

"are already known to have been developed for most types of cases that are likely to arise, such as contract, tort, succession, administration, matrimonial property, marriage, divorce, legitimacy, adoption, and so on."

These writers clearly and consciously draw on comparative law, although Robertson³⁸ disapproves of "international principles of comparative law determining disputed characterizations."

It will be interesting to see what remains of the Bartin-Kahn theory after dealing with particular problems in the course of this book.

However, the "logical" argument has been overturned in a striking manner, thanks to the special refutations by Neuner³⁹ and, more recently, by Cook,⁴⁰ both pointing out

³⁵ NUSSBAUM, D. IPR. 48, 194, 288; NUSSBAUM, Principles 73.

³⁶ MAURY, 57 Recueil 1936 III 325 at 504.

³⁷ ROBERTSON, Characterization 91.

³⁸ ROBERTSON, Characterization 31, 189.

³⁹ NEUNER, Der Sinn, esp. 132; also "Policy Considerations in the Conflict of Laws," 20 Can. Bar Rev. (1942) 479 at 484.

⁴⁰ COOK, Legal Bases, esp. 214.

the mistake of seeking in internal law the concepts needed in conflicts law. The naïve argument they criticize attributes an absolute character to juridical concepts, irrespective of their purposes; it presupposes that the concepts of domicile, contract, capacity are identical in the laws of property, family, jurisdiction, taxation—and conflicts! Only the ancient “realism of concepts,” which had some force in Greco-Roman philosophy and a disputed role in Roman jurisprudence,⁴¹ and the *Begriffsjurisprudenz* of the nineteenth century, ridiculed in Jhering’s “Heaven of Concepts,” present equal errors. The relativity of legal concepts is a mere commonplace in all other departments of law.

The chief reason why the present writer started the attack against that theory and here stresses its utter unsoundness, is illuminated by the very title of Bartin’s paper, “On the impossibility of arriving at a definitive suppression of the conflicts of law.” Naturally, if each conflicts law is nothing but an annex to the corresponding internal law and receives its sense and meaning only from this national and local source, uniformity cannot be achieved, even though all conflicts laws should be unified, without simultaneous unification of all municipal laws. The temporarily complete victory of this idea has weighed heavily on hopes and endeavors to reform and unify the national bodies of private international law. Black pessimism resulted, and it is no wonder that the excesses of nationalism in our field were particularly serious in the writings of the many students who followed Kahn and Bartin. This gloomy outlook, unfortunately, is still shared by certain present writers.

As things now stand, few points respecting the writer’s opinion still seem to call for explanation. The most significant is the objection on *a priori* grounds that this comparative-

⁴¹ SOKOŁOWSKI, *Die Philosophie im Privatrecht* (2 vols., Halle, 1902-1907), and for criticism, RABEL, *Vierteljahrsschrift für Wissenschaftliche Philosophie und Soziologie*, 1904, 108.

analytical method, though representative of the future, is useless for existing law.⁴²

It has never been denied that the actual conflicts rules of the European codifications or those usually applied by Anglo-American courts originally had linguistic connections. The question is merely that of "freeing," "emancipating," these rules from their domestic background. Is this illicit? A few Italian writers say so; in their opinion, rules must be interpreted within the perspective of the legislator. But, even if this were true, do we have to assume that draftsmen of conflicts rules have been ignorant that foreign laws may differ in many respects from their own conceptions? In laying down the rule that wrongs are governed by the law of the place of wrong, do legislators not consider the possibility that an injury done abroad may constitute a wrong where committed, though not in the forum? Or are conflicts rules not supposed to be applied indifferently as respects all laws of civilized peoples? In fact, their compass is generally world-wide, and, in the absence of a universal language, they necessarily employ the "word-symbols" of the domestic vocabulary.

Again, whether rigid limitations on the interpretation of legal rules be inferred from the alleged intention of the legislator, as the Italian school seems to postulate, or from the principle of strict construction of statutory texts, often followed at common law, such restrictions are inconsistent with the methods of creative interpretation recognized in modern legal practice. Formalism is particularly misplaced in construing conflicts rules, the overwhelming majority of which are in an unsettled and formative stage throughout the world. Most are unwritten, and many of the written rules are vaguely

⁴² PACCHIONI, *Elementi* 182; FEDOZZI 190; DE CASTRO, 20 *Revista Der. Priv.* (1933) 240 at 247; FALCONBRIDGE, "Characterization in the Conflict of Laws," 53 *Law Q. Rev.* (1937) 235 at 245, followed by DAVIES, "Règles générales des conflits de lois," 62 *Recueil* 1937 IV 497; MAURY, 57 *Recueil* 1936 III 325 (definitely milder).

drafted and defectively constructed. As a matter of fact, the art of interpretation, a versatile and fecundating implement of modern private law, is not used with entire efficiency in our field. Clumsy constructions and half-hearted attempts at adjusting antiquated maxims or correcting inexact texts abound. Should progressive development from case to case and through systematic effort be barred, this stepchild of jurisprudence would be an orphan indeed.

Yet, in the case of many writers, one hand does not seem to know what the other is doing. While Ago is the most intransigent adversary of analytical comparison, he has selected from a hundred cases discussed in the literature, one, the simplest, to demonstrate with what perfect safety the *lex fori* theory operates.⁴³ This is the case. Under German and other laws, spouses may by settlement institute heirs to either of them. The Italian legislation does not expressly allow such appointment by contract of a successor upon death. How should an Italian judge consider such a settlement by German spouses? Ago agrees that the question is covered by the Italian conflicts rule concerning intestate succession and wills, although these two grounds of succession do not include settlements. German law therefore governs. But Ago declines to accept any extensive interpretation based on comparison of the three grounds of inheritance involved. He takes the application of the conflicts rule respecting inheritance for granted, because the Italian inheritance law, tacitly excluding settlements respecting succession at death, implicitly classifies them as grounds of succession. By chance, the question came up in the French Court of Cassation.⁴⁴ A prenuptial settlement concluded in France by Italian nationals contained a stipulation by the wife, leaving at death the unrestricted portion of her

⁴³ AGO, 58 Recueil 1936 IV 247 at 333.

⁴⁴ Cass. (req.) (May 7, 1924) Revue 1924, 406, Clunet 1925, 126. The French law of the situs was likewise applied to a settlement of Spanish spouses, Cass. (civ.) (April 2, 1884) Clunet 1885, 76.

estate, including a French immovable, to the husband. It was pleaded that the settlement was void under Italian law, since it contemplated a donation of future acquisitions. The court held the gift valid under the *lex situs*, viz., the French provision allowing devise by prenuptial settlement, thus emphasizing the contractual aspects of the transaction. Niboyet apparently conceives that, while the French court proceeded on the basis of the law of succession, an Italian court would have held the gift invalid specifically on the ground of the conflicts rule concerning matrimonial property.⁴⁵ However all this may be, since the Italian Code does not recognize such agreements either in the chapter on matrimonial property or in defining grounds of succession, the characterization cannot be inferred from these chapters. Unconsciously, Ago did assimilate the foreign institution within the titles *mortis causa* on the basis of a comparison of legislations.

The process required for such interpretations, in fact, is necessarily of a comparative nature and has always been so recognized by thoughtful scholars.⁴⁶ Assuredly, the comparison has not always been comprehensive, systematic, and fully documented. But today, at least in civil law countries, it is no excuse to neglect comparative studies on the ground of unavailability of information. So much has been done in making the sources and literature accessible even in distant countries that the existence of gaps should be an incentive rather than a deterrent for scholars able to collaborate. So far as interstate conflicts go, the studies in this country are the most prominent example of continuous consideration of some fifty internal laws. Never has comparative law been more thoroughly utilized than in this country, and never so much uniformity achieved.

⁴⁵ See NIBOYET 503 no. 417.

⁴⁶ See for instance KAHN, 1 Abhandl. 315, 491; 2 Abhandl. 18.

It has been objected, nevertheless, that a scientific approach to conflicts law by comparative critique is precluded by the defective conditions of comparative research and that conclusions will be arbitrarily subjective. Such an assertion indicates lack of personal experience in such work. The common law is a living refutation. In civil law countries, no serious student of conflicts law has failed to consider neighboring legislations. Moreover, comparisons between the common law and the civil law were undertaken by Story in America in 1834 and by Bar in Europe in 1862 with patent success. To bridge the gulf between these two halves of the legal world is the task of the present generation of lawyers. Hidden behind apparent dissimilarity, there are fundamental likenesses, suggesting international cooperation, though of course not necessarily unification.

No doubt, existing comparisons of the kind required in the field of conflicts of laws are of recent date and far from exhaustive.⁴⁷ General concepts, which may be used universally, are being built up but slowly. However, a great deal of knowledge has been attained, and to gain more is within the capacity of modern science. Researchers to a variable extent are of course engrossed in the legal culture in which they have been educated.⁴⁸ A lawyer is apt to state more accurately and to give preference to the conceptions of his system over foreign ideas. However, with increasing international collaboration in comparative work, the qualities of the different scholars will compensate for each other, and the multiplicity of views in the world will provide a rich variety of outlooks. In any case, an imperfect attempt to do justice to foreign institutions

⁴⁷ The following are not new admissions by the writer. See RABEL, 3 *Z.ausl. PR.* (1929) 756; 5 *Z.ausl. PR.* (1931) 287, *Revue* 1933, 1 at 61.

⁴⁸ RABEL, 3 *Z.ausl. PR.* (1929) 756; BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 *Brit. Year Book Int. Law* (1934) 46 at 59.

is superior to any technique which ignores them. Judges are fully entitled to limit their inquiries to the two or three laws primarily influencing a case in which legal science has done nothing to help.⁴⁹ Instinctively this is what the courts do.

With respect to the narrower subject of characterization, expediency alone is decisive. It may be that categories as defined by internal law have a role to play in such subjects as jurisdiction, procedure, taxation, etc., but ordinarily not in the case of conflicts rules. For conflicts law, characterization according to the law declared applicable in the conflicts rule also is by no means excluded, but only for special situations. Martin Wolff was perhaps inspired by the problems of marital property with which he first happened to deal, to suggest this method of characterization. In principle, a private law term used in a conflicts rule means what is common to the various institutions of the national laws serving the same legislative purpose.

It is not even true that the so-called connecting factors should always be understood as defined by domestic law. Domicil cannot be so simply treated. Nationality is exclusively defined by the state whose national an individual is claimed to be. The place of contracting in negotiations between absent parties is not to be determined by the law of the forum alone, at least if under this law the place is found to be situated abroad, *et cetera*.

IV. THE SECOND PART: REFERENCE TO A LEGAL SYSTEM

I. The Nature of the Reference

While American students of conflicts law but recently have begun to discuss other general problems, as a rule they have been interested in the controversy regarding the *locus standi* of foreign law in court.

⁴⁹ RABEL, 5 Z.ausl.PR. (1931) 267, Revue 1933, 1 at 37.

The doctrine of territorialism initiated by d'Argentré and perfected by Huber is predicated upon Huber's first axiom that the laws of a state have force only within the territorial limits of its sovereignty. This tenet, adopted in the American cases, was solemnly formulated by Story, Dicey, and Beale.⁵⁰ The first section of the Restatement reproduces it literally:

"no state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law . . ."

"Law" in this connection means internal law, and the contention therefore is that foreign internal law has no "force," even though invoked by a conflicts rule. The flagrant inconsistency of this thesis with actual needs and practices was initially relieved by Huber's invention of "*comitas gentium*" and, after this shallow idea had finally exploded,⁵¹ by Dicey's and Beale's attempt to reanimate the theory of vested rights.⁵² Hence the Restatement, section 1, continues:

". . . but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states."

This theory has also been employed in modern France by Pillet and Niboyet⁵³ on the background of conceptions eminently hostile to the application of foreign law. However, both the Anglo-American and the French theories of acquired rights have been critically destroyed,⁵⁴ together with that of neoterritorialism.⁵⁵

⁵⁰ STORY §§ 18ff., DICEY 9; 1 BEALE 52.

⁵¹ DICEY 8; 1 BEALE 53; GOODRICH 7; LORENZEN, 6 *Répert.* 282 nos. 29, 30.

⁵² DICEY 58; BEALE, 3 *Cases on the Conflict of Laws* (1902) §§ 1-5; 3 *Treatise* 1968; CHESHIRE (ed. 1) 3, revoked in ed. 2, 86.

⁵³ VAREILLES-SOMMIÈRES V ff., XXXIV ff.; PILLET, *Principes* 495-571; NIBOYET, 5 *Répert.* 708 to 725.

⁵⁴ United States: COOK, "The Logical and Legal Bases of the Conflict of Laws," 33 *Yale L. J.* (1924) 457, *Legal Bases* 1; LORENZEN, "Territoriality, Public Policy and the Conflict of Laws," 33 *Yale L. J.* (1924) 736; YNTEMA, "The Hornbook Methods and the Conflict of Laws," 37 *Yale L. J.* (1928) 468; HELLMANN, "Judicial Method and Economic Objectives in Conflict of Laws,"

The Italian writers think, nevertheless, that the phenomenon of the application of a law created by a foreign state still presents a problem, and on independent grounds eminent critics of Beale's theory in this country think the same. In the opinion once proposed and then revoked by Anzilotti, which has been perpetuated by others, a foreign rule cannot be applied unless it has been appropriated by the state of the forum and transformed into a domestic rule.⁵⁶

This theory of "material reception" of foreign law supposes an untenable fiction. Nobody really believes that Norwegian marriage law is made the law of Oklahoma, just for the purpose of deciding in Oklahoma whether the parties years ago celebrated a valid marriage in Oslo. Where one party sues for annulment, a Norwegian enactment intervening in the meantime and modifying the conditions of annullability of previous marriages, is applicable,⁵⁷ clearly because the Norwegian law and not that of the forum governs.

Another opinion is that the foreign rule is adopted by "formal reception" only; the conflicts rule is construed as implying that the foreign rule is inserted into the body of the

43 Yale L. J. (1934) 1082; STUMBERG, "Conflict of Laws. Foreign Created Rights," 8 Texas L. Rev. (1930) 173 and STUMBERG 9.

France and Belgium: ARMINJON, 1 Précis 271 and ARMINJON, "La notion des droits acquis en droit international privé," 44 Recueil 1933 II 5 esp. at 59; J. DONNEDIEU DE VABRES 754; WIGNY, "La théorie des droits acquis d'après Antoine Pillet," 58 Revue Dr. Int. (Bruxelles) (1931) 341 and WIGNY, *Essai* 159.

Germany: HORST MÜLLER, *Der Grundsatz des wohlervorbenen Rechts im internationalen Privatrecht*, Hamburger Rechtstudien Heft 26 (1935), authoritatively reviewed by GUTZWILLER, 10 Z.ausl.PR. (1936) 1056.

⁵⁵ All European writers have protested against the principle of territorialism. See for instance NIBOYET, 604, stating that the French courts, for some time immediately after the Code came into force, were perhaps impressed by the memory of the former strict territorialism of the statistes, but actually rejected this nefarious principle.

⁵⁶ ANZILOTTI, *Studi critici di diritto internazionale privato*, parte II (1898); PACCHIONI, *Elementi* 137; *Contra*: FEDOZZI 162: "artificial," "a phantom of studio"; MAURY, 57 Recueil 1936 III 325 at 382.

⁵⁷ BARTIN, 1 Principes 298.

domestic law of the forum but with the significance and value it has under the foreign system.⁵⁸

The "local law theory" as developed in this country is kindred to these conceptions, presumably more closely to the idea of "formal" reception. It differs in the thesis peculiar to this country that the judge creates the law according either to his own or to foreign legal rules as the case may require. But, for conflicts law more than any other branch of national law, law must exist before and outside of lawsuits.

After all, why can the foreign rule not simply come into court without crutches? Is it not sufficient that the court's own conflicts rule orders application? Once more, the full power of conflicts rules seems to be greatly underestimated. On the other hand, no kind of domestication invests a foreign rule with exactly the same power that domestic rules have. For example, the maxim *jura novit curia* is usually not extended to foreign law.⁵⁹ The dominant opinion in Europe⁶⁰ as well as in this country⁶¹ has entirely discounted the remnants of the doctrine inherited from Ulrich Huber; there is no longer any problem.

2. The Extent of the Reference

The theory of Bartin, Kahn, and their followers purports not only to determine the content of the first part of the conflicts rule but also that of the second part; not only should

⁵⁸ ANZILOTTI, *Corso di diritto internazionale* (Roma, 1923) 75; GHIRARDINI, "Sull'interpretazione del diritto internazionale privato," 13 *Rivista* (1919) 290; PERASSI, "Su l'estensione del diritto internazionale privato italiano alle nuove Provincie," *Rivista* 1926, 518; BALDONI, *La successione nel tempo delle norme di diritto internazionale privato* (Roma, 1932) 9; AGO, 58 *Recueil* 1936 IV 247; BOSCO 95; also MAURY, 57 *Recueil* 1936 III 325 at 386.

⁵⁹ BARTIN, I *Principes* 295.

⁶⁰ PILLET, I *Traité* no. 51; BARTIN, I *Principes* 20 § 10; LEREBOURS-PIGEONNIÈRE no. 216; RAAPE 12; CAVAGLIERI, *Revue* 1930, 397, 405.

⁶¹ CAVERS, "A Critique of the Choice-of-Law Problem," 47 *Harv. L. Rev.* (1933) 173, 177, thinks that the majority of voices is contrary to the local law theory.

the matters referred to a foreign law be selected according to domestic conceptions, but also the foreign rules to which these matters are referred must accord with the domestic system. Consequently, within the limits of a conflicts rule respecting "torts," foreign substantive rules concerning what in the eyes of the forum would be "quasi-contract" are inapplicable.

An example of this kind of argumentation is furnished by the well-known English decisions relating to the statute of limitations. In the leading case of *Huber v. Steiner*,⁶² Tindall, C. J., refused to apply the French rule of prescription to a French promissory note. He declared the French rule procedural, on the ground of Story's test that a limitation imposed on enforcement only rather than upon the right is procedural in character. German law has been treated in the same way in the English courts.⁶³ Actually, the undisputed German conception and the dominant French opinion is that a limitation bars the action only and the right survives. This does not mean that a limitation is procedural; it is substantive in the precise sense here relevant, namely, that it provides the debtor an exception to his obligation, a material right of defense.⁶⁴ Consequently, the French and German courts characterize statutes of limitations as substantive for the purposes of conflicts law. Modern English writers agree that the English cases are wrong; they deprive the debtor of a defense because of the accidental forum.⁶⁵ The American decisions in cases

⁶² 2 Bing. N. C. 202 (C. P. 1835).

⁶³ *Société Anonyme Metallurgique de Prayson v. Koppel*, *The Times*, November 2, 1933, 77 *Solicitor's Journal* (1933) 800 cited by BECKETT, 15 *Brit. Year Book Int. Law* (1934) 75, *supra* n. 48.

⁶⁴ This alone is relevant. Neither BECKETT, 15 *Brit. Year Book Int. Law* (1934) 46 at 75, *supra* n. 48, nor ROBERTSON, *Characterization* 248, 251, have reported correctly on the Continental law.

⁶⁵ BECKETT, 15 *Brit. Year Book Int. Law* (1934) 75 ff., *supra* n. 48; CHESHIRE 38, 42; MENDELSSOHN BARTHOLDY, "Delimitation of Right and Remedy," 16 *Brit. Year Book Int. Law* (1935) 20 at 41; ROBERTSON, *Characterization* 64; CORMACK, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 *So. Cal. L. Rev.* (1941) 221 at 234.

where the courts do not feel bound by the early doctrine, give effect to foreign statutes of limitations.⁶⁶

While Kahn corrected his doctrine by suggesting some latitude in recognizing foreign rules as applicable but protested against the application of foreign law in its totality,⁶⁷ recently Bartin has radically restricted the scope of his theory.⁶⁸ He has done so, following an argumentation usual in Italy, namely, that, in the first instance, the *lex fori*, being the legal order in which the conflicts rule originates, prescribes the characterization to be adopted, but that, the applicable law having been selected, it must be applied with its attendant interpretation.⁶⁹ In other words, characterization by the *lex fori* for choice of law—characterization by the foreign law once chosen. This reasoning has found favor with several Anglo-American writers under the name of “secondary characterization,”⁷⁰ but seemingly they do not agree with each other on numerous details.

This generous concession to common sense is welcome, but, due to its faulty origin in the *lex fori* theory, it is not broad enough and lacks a clear concept. For instance, it has been recently suggested⁷¹ that, if the object of a conflicts rule is “primarily” characterized as property, those foreign rules that

⁶⁶ See *Maki v. George R. Cooke Co.* (C.C.A. 6th, 1942) 124 F. (2d) 663, and Note, 9 U. of Chi. L. Rev. (1942) 723.

⁶⁷ KAHN, 1 Abhandl. 190.

⁶⁸ BARTIN, 1 Principes 231; 31 Recueil 1930 I 561, 603.

⁶⁹ ANZILOTTI, Corso di lezione (1918) 359 and Corso di diritto internazionale privato (1925) 79; CAVAGLIERI 104; PERASSI, Lezione di diritto internazionale, parte prima (1922) 78; UDINA, Elementi 51; AGO, Teoria 145; FEDOZZI 183; BOSCO 107. These authors, however, speak in a very fragmentary manner.

⁷⁰ CHESHIRE 37-45; UNGER, “The Place of Classification in Private International Law,” 19 Bell Yard (1937) 3 at 17; ROBERTSON, Characterization chs. v, 118 ff., and IX, 235 ff.; CORMACK, 14 So. Cal. L. Rev. (1941) 221 at 234, *supra* n. 65. *Contra*: RHEINSTEIN, Book Review, 8 Brooklyn L. Rev. (1938) 253 at 256; FALCONBRIDGE, “Renvoi, Characterization and Acquired Rights,” 17 Can. Bar Rev. (1939) 369 at 373; NUSSBAUM, Book Review, 40 Col. L. Rev. (1940) 1461, 1467.

⁷¹ CORMACK, 14 So. Cal. L. Rev. (1941) at 235 and n. 86, *supra* n. 65.

are considered property law in the foreign country should be applied. Yet, in a court in state X, why should a claim recognized by the domestic law of the forum (state X), on the theory that property is recoverable, not be sustained under the "applicable" law of Y, which regards the property as lost but provides recovery on some quasi-contractual or other theory? Or, to return to the statutes of limitations, the German Reichsgericht in a notorious early decision refused to apply the limitation statutes of Tennessee, whose law was considered controlling, because in America the defense was regarded as merely procedural.⁷² This refusal to apply a foreign provision because it is considered procedural in the foreign law, illustrates the theory of secondary characterization; it is evidently absurd.

Recently, the Reichsgericht discovered the correct solution long anticipated by many writers, namely, to apply the American statute.⁷³ The reasoning is, however, uncertain and partly based on the precarious ground that in German eyes the American remedy "also" possesses a "substantive" element justifying its application.

All such doubtful and complicated manipulations are unnecessary. The needs are simply and efficiently fulfilled by the application of the foreign law as it stands and, despite the admonition of Kahn, "in its totality."⁷⁴ If the first part of the conflicts rule, the description of the matter referred to the applicable law, is correctly formulated, i.e., not burdened by internationally impractical concepts, it contains in itself all that is necessary for its purpose. All else belongs to the selected system. In other words, the question which state's law governs the case, is answered by the choice of law; there is no reason

⁷² RG. (Jan. 4, 1882) 2 RGZ. 21.

⁷³ RG. (July 6, 1934) 145 RGZ. 121, IPRspr. 1934, no. 29, *Revue Crit.* 1935, 447.

⁷⁴ See the writer's detailed argument, 5 *Z.ausl.PR.* (1931) 273, *Revue* 1933, 1 at 44. No comparative law is needed for this purpose as certain critics have suspected.

why reference should not be made to this law as a whole instead of to parts prematurely chosen. (Whether some public policy of the forum is involved is entirely separate and independent.) More precisely, the court has to decide the question exactly as a court sitting in the foreign state would do, if such court had jurisdiction and had to apply its own domestic law.