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THE PROPER LAW OF THE CONTRACT*

MORE than any other branch of the law, the science of Conflict of Laws lends itself to a fruitful study from a comparative point of view.¹ For though its character is that of municipal law, it tends to find the most practical solutions in cases where a clash of two different systems of law seems unavoidable. Rigid national principles are scarce and the science seems altogether unorthodox. Within existing systems of Conflict of Laws, it is the principle of the law governing contracts which is open to the greatest number of diverse solutions. This, because of the fact that contracts, more than any other legal institution, are less static than dynamic. Moreover, they are created by the free will of the parties. Thus, we believe, that a study of the solutions used in a number of European countries might be of use to the legal profession of the United States even though practice and doctrine are far more established there than in Europe.

Conflict of Laws or Private International Law, as it is more commonly called in Europe, has played the part of Cinderella in the codifications of most European systems, and

* This article concerns itself with a comparative study of some aspects of the Continental and Anglo-American Systems.

Note: The authors wish to express their sincere gratitude to Professor H. C. Gutteridge, LL.M., K.C., Fellow of Trinity Hall of the University of Cambridge, under whose guidance this material was gathered during a seminar on the subject Lent Term 1938 at the University of Cambridge.

¹ See KUHN, COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW; 4 FICKER, RECHTSVERGLEICHENDES HANDWOERTERBUCH (1933) 371-390.

It is impossible to enter into the question of the relation between international law and conflict of laws. Reference may be made to the discussion by Arminjon (1928) (1) REC. DES COURS 433-509; (1929) REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE 680-98 and a forthcoming article by Dr. Lipstein containing a full bibliography. We regard the attempt to find the basis of a system of conflict of laws in the conception of sovereignty as unfortunate; for either it means nothing more than that every state may introduce such rules of conflict of laws as it thinks fit. Or it may mean that every system of laws has to respect the sovereignty of other systems. Though this may be adequate (but not theoretically sound) in situations wholly connected with one territory, it fails to fulfill its task in cases connected with several systems of law. For what is the meaning of "respecting sovereignty"? Does it mean the universal recognition of the *lex patriae* (so Zitelmann, Frankenstein, Pillet) the *lex domicilii* (so v. Bar), or the *lex loci contractus*?

No answer can be given here; but it may be pointed out that it ends in a dispute upon questions of *a priori*.

within the few systems that have attempted a codification of it, the rules governing contracts have often been consciously omitted. Thus we find detailed rules only in the Austrian aGGB² and the parts of Czechoslovakia and Yugoslavia which formerly belonged to the old Austrian Empire, in addition to Italy³ and Poland.⁴ In France, Germany and Switzerland the matter has been left to the courts as in the case of England and the United States. But as the role of precedent in Europe is a different one from that in the Common Law of England, case law has not been quite successful in introducing undisputed rules. For precedents are not binding upon any but the highest courts and even these are empowered to overrule their own precedents under certain conditions. This power is, of course, also exercised by Anglo-American courts but so rarely as not to seriously shake the ruling power of case precedents. In practice, however, European case law does establish a certain continuity, if only for the reason that inferior courts are reluctant to contradict cases decided by the supreme courts for fear of being overruled and thus to hamper the chances of promotion of the judges concerned.⁵ On the whole we may therefore say that a certain practice has been established, but exceptions exist and there is always a certain chance of being able to criticize, attack and finally bring about a change in this sphere of no man's land.

Writers have been only too willing to accept this task, and during the past forty years an immense literature has sprung up. Of recent text-book writers who have not limited themselves to a descriptive discussion we have to mention Arminjon, Niboyet, Frankenstein, Nolde, Sauser-Hall, Jeanprêtre and Haudek⁶ who have brought into bold relief the

² 4, 34-37.

³ Art. 9, § 2. disp. rel. c.c.; art. 58, c. comm. (1933).

⁴ Arts. 7-10, Statute of 2.8.1926.

⁵ The career of judges, on the continent of Europe, is distinct from that of other professional lawyers. After having completed their course of education, they have to decide whether they intend to go to the Bar or to the Bench, where they start as Assistant Judges, both in Regional and County Courts.

⁶ 2 ARMINJON, *PRECIS DE DROIT INTERNATIONAL PRIVE* (2d ed. 1934) 231 sq.; NIBOYET, *MANUEL DE DROIT INTERNATIONAL PRIVE* (2d ed. 1928) 789 sq. no. 681; (1927) (I) *REC. DES COURS* 1-12; 2 FRANKENSTEIN, *INTERNATIONALES PRIVATRECHT* (1929) 123 sq. no.; JEANPETRE, *LES CONFLITS DE LOIS EN MATIERE D'OBLIGATIONS CONTRACTUELLES SELON LA JURISPRUDENCE ET*

problem as it exists on the Continent. In England the influence of Story, the great American jurist, has, during the last century, largely been replaced by the work of the late Professor Dicey, but of late the writings and teachings of Professor H. C. Gutteridge and Dr. G. C. Cheshire⁷ have been well received by scholars and practitioners alike. American legal thought on the subject, initiated by Judge Story, is now best represented by the work of Professors Beale, Lorenzen and Cook.⁸ Before expressing the views and tendencies outlined by these writers, it seems advisable to touch on the position of the law as it stands today.

The French Code Civile does not contain any pertinent provisions but the courts have taken a steady course and a well established "jurisprudence" (case law)⁹ enables us to draw definite conclusions.¹⁰ The governing principle is that of autonomy of will, *i.e.*, of free choice of law by the parties.¹¹ However, it happens, and not only occasionally, that the parties have omitted to express their intention. It is then that canons of interpretation come into play. First, the judge is called upon to investigate whether a tacit reference to any system of law places that contract under the rules of that system.¹² Failing this, he has to apply certain tests, whether

LA DOCTRINE AUX ESTATS-UNIS (1936); HAUDEK, DIE BEDEUTUNG DES PARTEIWILLENS IM INTERNATIONALEN PRIVATRECHT (1931); SAUSER-HALL, ZEITSCHRIFT FUER SCHWEIZERISCHES (1925) 271a-320a; Nolde, *Annuaire de l'Institut de Droit International* (1925) (32) 50-145, 501-508; (1927 (I) *id.* at 937-954; (II) *id.* at 194-225, 336.

⁷ Professor H. C. Gutteridge (1936) CAMBRIDGE L. J. 19; DR. G. C. CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 241 *et seq.*

⁸ BEALE, A TREATISE OF THE CONFLICT OF LAWS (1936); BEALE, CASES ON CONFLICT OF LAWS (1909); LORENZEN, CASES ON CONFLICT OF LAWS; LORENZEN, A COMPARATIVE STUDY OF THE LAW OF BILLS AND NOTES (1919).

⁹ Precedent, in continental Europe, as we have stated above, does not carry the same weight as in Anglo-American law. Binding upon the supreme courts, but subject to overruling by a special form of judgment by the full court, it is only of persuasive authority with regard to inferior courts. The latter are not bound by their own previous decisions.

¹⁰ This would not appear so from the attitude taken by text-book writers who attempt to introduce their own solution into the existing law.

¹¹ Cass. req. 28.12 (1936); (1937) REV. CRIT. 684, with note by Battifol; Cass. civ. 31.5 (1932); (1934) REV. CRIT. 909, with note by Niboyet; Cass. civ. 12.5 (1930); (1931) Clunet 164; *cf.* (1930) Clunet 417. See also Cass. civ. 5.12 (1910); Sirey (1911) 1, 129, with note by Lyon-Caen; (1911) REV. DARRAS 395; Cass. req. 19.5 (1884); Sirey (1885) 1, 113, with note by Lacointa; *cf.* HAUDEK, *op. cit. supra* note 6, at 59.

¹² Battifol (1935) REV. CRIT. 629; Cour d'Appel of Colmar (1934) Clunet 976; Lyon-Caen, Sirey (1911) 1, 130; Cass. req. 10, 12 (1907); Sirey (1910) 1, 132.

as canons of interpretation or as objective tests cannot be stated with any certainty.¹³ These tests are as follows: (1) If both parties are of the same nationality then the *lex patria* or the law of their nationality governs. If the parties are domiciled in any other country than that of their nationality then the law of their domicile governs.¹⁴ (2) If the parties are of different nationalities then the *lex loci contractus* or the law of the place of contracting governs.¹⁵ (3) If the place of contracting is difficult to ascertain then the law of the place of performance will be applied.¹⁶ (4) Finally, the court will apply that system which would uphold or look with the greatest favor on the contract.¹⁷

Arminjon suggests a slight change in this order reversing the position of tests numbers two and three. Moreover, he suggests that in the case of test number three the *lex patria* of the debtor should supercede the *lex solutionis*, the law of the place of performance, provided it is a unilateral contract.¹⁸ These contentions, however, have not found much favor in the decided cases.

¹³ See Niboyet (1936) REV. CRIT. 464.

¹⁴ Cf. Lyon-Caen, note to Sirey (1911) 1, 129, and to (1900) 1, 161, quoting many older cases. See Cass. req. 19.5 (1894); Sirey (1885) 1, 113; Cour d'Appel, Douai 2.11 (1933); Sirey (1934) 2, 109 (2).

¹⁵ Cour d'Appel, Colmar, 16.2 (1937); (1937) REV. CRIT. 687, with note by Battifol; cf. note to Sirey (1913) 4. See Cass. req. 28.12 (1936); (1937) REV. CRIT. 684; Cass. civ. 15.5 (1935); (1936) REV. CRIT. 464; Battifol (1937) REV. CRIT. (1937) 434; Cass. civ. 31.5 (1931); (1934) REV. CRIT. 911; Sirey (1933) 1, 17, with note by Niboyet; Cass. civ. 15.12 (1910); Sirey (1911) 1, 129; (1911) REV. DARRAS 395; Cass. civ. 6.2 (1900); Sirey (1900) 1, 161; Cour d'Appel, Paris, 25.6 (1931); (1932) Clunet 933 (5); Cour d'Appel, Colmar, 11.3 (1933); (1934) REV. CRIT. 138; Cour d'Appel, Douai, 2.11 (1933); Sirey (1934) 2, 109 (regarding it as the presumed intention of the parties, contrary to the well established doctrine of the Cour de Cassation). See also Colmar 17.2 (1937); Battifol (1934) REV. CRIT. 639/40.

¹⁶ Decisions favouring the *lex loci solutionis* are gaining ground. Cour d'Appel, Paris, 26.3 (1936); (1936) REV. CRIT. 487; Battifol (1937) REV. CRIT. 435; Cass. civ. 31.5 (1932); (1934) REV. CRIT. 909; Cour d'Appel, Paris, 28.2 (1935); (1935) REV. CRIT. 748, with note; Cour d'Appel, Metz, 12.4 (1934); (1935) Clunet 988 (the court purports to interpret the intention of the parties); Cour d'Appel, Colmar (Belfort) 2.5 (1933); (1934) Clunet 424; (1934) REV. CRIT. 163; Battifol (1935) REV. CRIT. 631. But cf. Colmar, 30.1 and 13.3 (1933); (1934) Clunet 951; BATTIFOL, *op. supra* note 12, at 630 (where the court was unable to locate the place of execution of the contract).

¹⁷ WEISS, MANUEL DE DROIT INTERNATIONAL PRIVE (9th ed. 1925) 571 sq.; 2 ARMINJON, *op. cit. supra* note 6, at 248 sq. No cases can be quoted in favour of this proposition.

¹⁸ 2 ARMINJON, *op. cit. supra* note 6, at 250.

In Switzerland the law governing the essential validity of contracts has been summed up in the following words by the Tribunal Federal, the highest court of that country, in a recent case:

“Following a long line of decisions of the Tribunal Federal concerning the essential validity of contracts, we hold that that system of law is applicable which the parties intended submission to when the contract was concluded or lacking an express declaration, that system of law which they would have intended to apply if they had considered this question at all. The system of this presumed intention is the system of that country with which the contract in question has the closest local connection.”¹⁹

The Swiss courts then, we can say, attempt to find the proper law of the contract—that law which is most closely connected with the contract. It is interesting to note that this has usually been held to be the law of the place of performance of the contract.²⁰ In cases where the places of performance are situated in more than one country, and one of the places happens to be Swiss, then Swiss law will be applied.²¹ In the case of a unilateral contract the law governing will be held to be the law of the debtor's domicile. In the same manner when a Swiss firm enters into a type of contract known as a “*massenvertraege*” or a “*contrad' adhesion*”—a standard contract by one debtor with a large number of creditors in various countries, the law of the debtor's domicile is applied, *i.e.*, the Swiss law.²² In the event the court is unable to find

¹⁹ *Arret du Tribunal Federal, Recueil officiel (A. T. F.) 40-II-391 and 63-II-307.* But free choice of law exists only at the time the contract is concluded. It does not go so far as to allow the parties to state, during the litigation, that they intended to apply Swiss law when the circumstances of the case point to a different system. The declaration by the parties during the case to apply a certain system of law not specified in the contract can serve only as an indication to the judge of what they intended when entering into the contract. But this presumption or guide is in no way binding upon the judge. *A. T. F. 63-II-44; A. T. F. 62-II-125; A. T. F. 60-II-300.*

²⁰ *A. T. F. 63-II-308.*

²¹ *A. T. F. 57-II-72.*

²² *A. T. F. 44-II-432.*

the "proper law of the contract", then it will apply the *lex fori* or the law of the forum.²³

Contracts concluded in Czechoslovakia between nationals and foreigners are governed by Czech law even if the contract is to be performed in a foreign country or the debtor is a foreigner.²⁴ The same system of law, *i.e.*, the *lex loci contractus*, is applied even though the contract is between foreigners, if the contract has been concluded in Czechoslovakia. However, foreigners have the option of stipulating, in their contract, that another system of law is to apply and this choice is binding on the Czech courts. They are limited in their choice to a system of law which has some connection with the contract.²⁵ Although on the Continent it is the general rule that the law of a man's nationality follows him wherever he goes, Czech law permits its citizens autonomy of will in making contracts outside of Czechoslovakia. This permission extends not only to a Czech and a foreigner but to two Czechs contracting in a foreign land. However, if the contract is to be performed in Czechoslovakia then Czech law will be applied.²⁶ Where two foreigners conclude a contract in a foreign land to be performed in Czechoslovakia they are permitted a free choice of the law governing that agreement. These rules apply to Austria as well.²⁷

According to Italian law, contracts are governed by the *lex loci contractus* but if the parties are of the same nationality then by their *lex patria*. But it is always open to the parties to prove a different choice of law.²⁸

The Polish Statute of 1926 provides an infinite variety of rules. The parties are free to choose for their contract one of the following systems: the *lex patria*, the *lex domicilii*, the *lex loci contractus*, the *lex loci solutionis*, or the *lex res sitae*.²⁹ Lacking a choice by the parties, the following system

²³ A. T. F. 44-II-492.

²⁴ OBCANSKY ZAKONNIK (Czech Code) § 36.

²⁵ *Ibid.*

²⁶ *Supra* note 24, § 4.

²⁷ *Supra* note 24, § 35. Unilateral contracts concluded by foreigners, being the debtors, are governed by Czech law or by the law of the nationality of the foreigners, depending upon which law is more favorable to the contract.

²⁸ Art. 9, § 2, disp. prel. c.c.; Art. 58, c. comm. UDINA, 6 REPERTOIRE DE DROIT INTERNATIONAL 510-12.

²⁹ Art. 7, Statute of 2.8 (1926); cf. Makarov. in Leske-Loewenfeld: 8 DIE RECHTSVERFOLGUNG IM INTERNATIONALEN VERKEHR (1929) 145 sq. no.

is applicable: in contracts referring to stock exchange and other markets, the law governing the market concerned; as to land, the *lex res sitae*; for retail commerce, the law of the residence of the vendor; all insurance contracts, the law governing the insurance company; professional contracts, the law where the profession is exercised; labor contracts generally, the law of the place where the labor was done.³⁰ In all other contracts not mentioned above: if the parties are domiciled in the same country, the law of the domicile; if not domiciled in the same country, then the law of the debtor's domicile in the case of unilateral contracts; in the case of bilateral contracts, or if the domicile of the debtor is unknown, the *lex loci contractus*. For the purpose of this statute the *lex loci contractus* is the law of that place where the offeror receives the acceptance.³¹

More general rules, in this respect, are applied in Germany. In the first instance, the principle of free choice of law by the parties is recognized.³² However, this does not mean that the parties may choose any law they may desire. A decision of the Reichsgericht, the highest court of the country, handed down in 1895, before the introduction of the new code of 1900, but which is still regarded as authority today, held that a marriage brokerage contract between two domiciled Saxons, executed and performed in Saxony, could not be submitted by the parties to the law of Prussia.³³ It is therefore suggested that the parties may choose the system of law they desire only so far as their contract has a certain connection with the system chosen.

In case the court is unable to find an expressed intention in the contract it has to look for a tacit one. Lacking this,

³⁰ *Id.* art. 8.

³¹ *Id.* art. 9.

³² *E.g.*, Gz. 145, 121 (1934); IPR. RSPR. (1934) n. 29; I. W. 3121 (1935) 33; BULL. INST. JUR. INT. 71, no. 8792; (1935) REV. CRIT. 447, with note by Mezger surveying the cases; RGZ. IPR. RSPR. (1934) n. 19; RGZ. 142, 417, 23; (1933) n. 21; (1931) nn. 30-32; (1930) nn. 30-31, 40, 48; (1929) nn. 31, 36, 43. It must suffice to refer to these cases and to LEWALD, DAS DEUTSCHE INTERNATIONALE PRIVATRECHT nos. 260-268, 10; REPERTOIRE DE DROIT INTERNATIONAL 71, n. 5; 73, n. 12; HAUDEK, *op. cit. supra* note 6, with numerous quotations at 47, n. 2.

³³ RGZ. 44, 300; LEWALD, *op. cit. supra*, at 212, n. 269; 10 REP. 79, n. 39.

³⁴ See *supra* note 32; RGZ. IPR. RSPR. (1930) nn. 32-33, 34; RGZ. 126, 196 (1929) n. 45. LEWALD, *op. cit. supra* note 32, at 212, n. 269; 221, n. 276; 10 REP. 74-75, nn. 14-17 and the cases quoted there.

the court is entitled to find the intention of the parties from the circumstances of the case and what system of law the parties would have chosen if they had ever considered the matter.³⁴ In addition the court may, in the last instance, apply the test of the *lex loci solutionis*—the law of the place of performance.³⁵ It is difficult to say when and how the courts apply one or the other of these tests, as it is nearly always possible to construe a fictitious intention and find that intention to be the *lex loci solutionis*.³⁶ It may be stated with some confidence that they are applied vicariously and that the *lex loci solutionis* is used as the last resort.

It is universally agreed that the English rule with respect to the essential validity of a contract calls for the application of the proper law of the contract. This, according to Professor Dicey's Rule 155, is the rule that governs, and he states it to be: "The proper law [of the contract] is the law by which the parties to a contract intend the contract to be governed, or the law or laws to which the parties intended to submit themselves."

The English courts have paid, and still continue to pay, great deference to the authority of Dicey, but no case has yet arisen wherein there was an express intention that a specific system of law should apply, with the possible exception of the case of the *Torni*,³⁷ but this is a doubtful case at best. Inevitably the courts are forced to deduce a presumed intention. This, of course, is really an objective test. Cheshire and Westlake³⁸ both contend that the courts adopt the objective test in every instance and therefore reject Dicey's theory of the proper law.³⁹

In attempting to find this proper law of the contract the courts have availed themselves of a number of rebuttable presumptions. The first of these presumptions is the *lex loci contractus* or the law of the place where the contract was

³⁴ See *supra* note 32; R.G.Z. IPR. RSFR. (1932) n. 27; (1930) nn. 30, 31; (1929) nn. 33, 37, 38, 47, 48, 49; LEWALD, *op. cit. supra* note 32, at 224, n. 281, with references.

³⁵ See LEWALD, *loc. cit. supra* note 32.

³⁷ THE TORNI (1932) Probate 27 at 78.

³⁸ CHESHIRE, PRIVATE INTERNATIONAL LAW, 249 *et seq.*; WESTLAKE, PRIVATE INTERNATIONAL LAW (7th ed. Bentwich) 299 *et seq.*

³⁹ DICEY, CONFLICT OF LAWS (5th ed. Keith) Rule 155 at 647 *et seq.* and 958 *et seq.*

made. This is always indulged in when the contract is to be performed where it was made or where no place of performance is specified.⁴⁰ If, on the other hand, the agreement between the parties is to be performed at a place other than that of the making, the presumption is that the law of the place of performance was intended by the parties.⁴¹ Thirdly, and this is a very rare case, where, in the case of maritime contracts, specific reference is made by the parties to the law of the flag of the ship as the governing rule, a court will adopt that law as conforming with the intent of the contracting parties.⁴²

Although throughout the numerous jurisdictions that comprise the United States, support can be found for almost every doctrine concerning the law governing the essential validity of contracts, it seems to be widely held, if in fact it is not the majority rule, as stated by Corpus Juris: "A contract is governed as to its intrinsic validity and effect by the law with reference to which the parties intended, or fairly may have presumed to have intended, to contract, the real place of the contract being a matter of mutual intention except in exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law."⁴³ "The intention of the parties may be either expressed or implied from their acts and conduct at the time of making the contract."⁴⁴ However, express provisions as to the law they desire to govern their contract must be made in good faith by the parties or the court will not give effect to them.⁴⁵

When construing this intent, the American courts have usually presumed, when no further statement was made, that the law of the place of contracting was intended by the parties because of the fact that they made their contract in that place, or, as it has been put, the contract is governed by the *lex loci contractus* unless a contrary intent appears to have been in the minds of the parties.

⁴⁰ P. & O. v. Shand (1865) 3 Moo P. C. (N. s.) 272.

⁴¹ Chatonay v. Brazilian Submarine Telegraph Co. (1891) 1 Q. B. 79; Benain v. Debono (1924) A. C. 514.

⁴² Lloyd v. Gilbert (1865) L. R. 1 Q. B. 115.

⁴³ 13 C. J. 277, § 19 *et seq.*

⁴⁴ Bertonneau v. Southern Pacific Co., 17 Cal. App. 439, 120 Pac. 53 (1911).

⁴⁵ 2 BEALE, *op. cit. supra* note 8, § 332.23 *et seq.*

However, where the contract is made in one country or place, to be performed, wholly or in part, in another place, the proper law, particularly as to performance, may be presumed to be the law of the place of performance.⁴⁶

Neither of these main presumptions is, as to the leading rules, conclusive as to the intention of the parties but they are important indicia of that fact.⁴⁷ Professor Beale does not see the intention of the parties as the basis of the law which ought govern contracts. His interpretation of the American cases does not place the intention of the parties as the leading rule. Considerable may be said for that opinion as it is often very difficult to find out, from the mere reading of a case, whether the judge applied the *lex loci contractus* as a rigid rule, or found that rule to have been intended by the parties.⁴⁸ It is sufficient to say, however, that rigid rules are applied in some of the states of the Union and the question of whether the rule which seeks to find the intention of the parties or one which lays down an unalterable legal principle is the leading rule is merely an academic quibble. A discussion of the relative merits of the two opposing camps is, however, imperative, and is dealt with in detail below.

CAPACITY.

In French law, capacity to enter into contractual relations is governed by the *lex patria*, or the law of the nationality of the contracting parties, according to the statutory provisions of Article 3, Section 3 of the Code Civile. To this is added the reservation that a foreigner dealing with French citizens in France cannot avail himself of his incapacity if he acted fraudulently and the Frenchman acted in good faith and with due caution.⁴⁹

⁴⁶ *Northwestern Mutual Life Ins. Co. v. McCune*, 223 U. S. 234, 32 Sup. Ct. 220 (1911); *Am. Spirits Mfg. Co. v. Albany*, 164 Ill. 186, 45 N. E. 442 (1896); *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154 (1891); *Doughery v. Equitable Life Ins. Co.*, 266 N. Y. 171, 193 N. E. 897 (1891); *Old Dominion Copper Mining Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193 (1909).

⁴⁷ *Mayer v. Rochw.*, 15 A. 235.

⁴⁸ 2 BEALE, *op. cit. supra* note 8, § 332.53 *et seq.*

⁴⁹ *de Lizardi v. Chaise*, Cass. req. 16.1 (1861); *Sirey* (1861) 1, 305, with note by Massé; *Lyon*, 30.4 (1907); (1908) *Clunet* 146; (1908) *REV. DARRAS*

Likewise in Swiss Law, the question of contractual capacity is governed by the *lex patria*. But foreigners, capable according to Swiss Law, cannot claim exemption afforded them by their national law.⁵⁰ This is also the rule according to the law of Germany.⁵¹

In accord with the general rule of the Continent as exemplified above, the law of Czechoslovakia applies the *lex patria* concerning the question of capacity of foreigners to contract in Czechoslovakia.⁵²

Capacity, in Italy, is also governed by the *lex patria* with the reservation that the law of the place of making the contract shall govern commercial contracts.⁵³ In Poland the *lex patria* is always applied.⁵⁴

The Anglo-American common law here makes a rather sharp break with the Continental tendency and refuses to recognize the doctrine of a personal law following a man wherever he may go. In England, Dicey supported the view that the law of the domicile of the parties should govern, but made vital exceptions to that rule, particularly in the case of mercantile contracts. In the case of these latter contracts, all agree that the *lex loci contractus* must apply although Dr. Cheshire would apply the proper law of the contract to this phase of its validity as well.⁵⁵

There is little doubt that in the United States the capacity of the parties to make a contract is, as a general rule, to be determined by the law of the place where the contract is entered into.⁵⁶ However, the law of the place of making the contract will not be given effect, as regards capacity, if it is contrary to the public policy of the forum.⁵⁷

630; Cassin (1930) (IV) REC. DES COURS 794, n. 94; NIBOYET, *op. cit. supra* note 6, at 712, n. 600.

⁵⁰ CODE CIVIL SUISSE, Title Final, art. 59; 12 a 14.

⁵¹ *Id.* art. 7, § 3 EGBGB; LEWALD, *op. cit. supra* note 32, at 58, nn. 73-77, with cases.

⁵² *Id.* § 36. Where foreigners are incapable according to the law of their nationality although this fact was not known to the other party, the contract cannot be enforced but the innocent party has a claim for damages.

⁵³ IDINA, 6 REP. DE DROIT INTERNATIONAL 510, n. 127, quoting App. Milan 1.7 (1914); (1914) RIVISTA DI DIRITTO INTERNAZIONALE 610.

⁵⁴ Art. 1, Statute of 2.8 (1926).

⁵⁵ CHESHIRE, *op. cit. supra* note 38, at 205 *et seq.*

⁵⁶ Mathews v. Murchison, 17 Fed. 760 (Cir. Ct. N. C. 1883); Union Nat. Bank v. Chapman, 169 N. Y. 538, 162 N. E. 672 (1902).

⁵⁷ Geneva First Nat. Bank v. Shan, 90 Tenn. 237, 59 L., R. A. 498.

. FORM.

In French law formalities are governed by the law of the place where the transaction takes place.⁵⁸ This is also the rule in Swiss law.⁵⁹

But in Germany, Poland and Czechoslovakia the law governing form is the proper law of the contract. Both countries, however, will recognize the formal validity of the contract if the *lex loci contractus* has been complied with.⁶⁰ In Italy the rule prevailing is the *locus regit actum*—the place where the act occurred—but if the parties are of the same nationality it is sufficient that the *lex patria* of the parties has been complied with.⁶¹

Dr. Cheshire, in his recent work, appeals for the proper law of the contract as governing with respect to form, but he has no authority for that proposition.⁶² It is usually held to be the English rule that the *locus regit actum* governs, although no cases seem to exist on the question of the law governing the formal validity of a contract, outside of marriage and revenue cases.

The American rule follows the general trend as stated above.⁶³ However, as respects formalities in the nature of the Common Law Statute of Frauds, Professor Williston suggests that such requirements be considered a matter of validity instead of a requirement of procedure or evidence, since the parties to a contract normally observe the formalities required to make it enforceable in the place where they are contracting. For if the Statute of Frauds is held to be a procedural matter that is the concern of the *lex fori* and as we have stated it is invariably difficult and often impossible to determine in advance what the forum will be. The cases are, on this point, somewhat divided.⁶⁴

⁵⁸ Cass. req. 19.5 (1884); Sirey (1885) 1, 113, with note (4) by Lacointa, quoting many cases.

⁵⁹ A. T. F. 46-II-490.

⁶⁰ Art. 11, EGBGB; art. 5, Statute of 2.8 (1926).

⁶¹ Art. 9 (1) disp. prel. c.c.

⁶² CHESHIRE, *op. cit. supra* note 7, at 243.

⁶³ Roubicek v. Haddad, 5 L. A. 938.

⁶⁴ 1 WILLISTON, CONTRACTS § 600.

REFERENCE TO MATERIAL PARTS OF FOREIGN SYSTEMS.

Not infrequently parties domiciled in the same country and of the same nationality, making a contract to be performed at the domicile, happen to include in their contracts some reference to a foreign system of law. This does not mean that the system is now governed entirely by some foreign system of law wholly unconnected with the contract. In fact it amounts to nothing more than that the parties, instead of inserting as contractual provisions all those rules of that foreign system in question, pertinent to their contract, have taken the shorter course of referring to those rules as such. A recent tendency to introduce such a limited choice of law (*liberté des conventions*)⁶⁵—limited to a defined set of foreign material rules has, however, been stopped by the Cour de Cassation, the highest French court.⁶⁶ Thus it remains open to the court to determine whether such contracts are to be governed by municipal or foreign law.

The reference of the parties to some defined set of rules of foreign law appears to exempt the contract altogether from the sphere of the application of German law owing to the wide discretion left to the parties and owing to the liberal interpretation of the parties' intention to subject the contract to some other system of law. It appears therefore that a *liberté des conventions*, such as proposed by French and German lawyers, and as dismissed by French courts, will only lead to the desired results if the parties refer expressly to that limited part of the foreign system of law they wish to apply as a contractual provision of their contract. They must also express their wish not to take the contract out of the system which would govern it but for the reference to

⁶⁵ ARMINJON, *op. cit. supra* note 6, at 310 sq.; NIBOYET (1927) (I) REC. DES COURS 57.

⁶⁶ HAUDEK, *op. cit. supra* note 6, at 41, n. 5, quotes; Cour d'Appel, Rennes, 16.7 (1926); (1927) Clunet 659; (1927) REV. DARRAS 523; ca. Cass. civ. 19.2 (1930); (1931) Clunet 90; (1930) REV. DARRAS 282; Limoges, 12.10 (1928); (1929) Clunet 355; 3 JAHRBUCH FUER SCHIEDSGERICHTSWESEN 374; *cf.* Mann (1937) (17) BRITISH YEARBOOK OF INTERNATIONAL LAW 101.

some rules of foreign law.⁶⁷ A slightly less rigid attitude is taken in Switzerland,⁶⁸ Austria and Czechoslovakia.⁶⁹

In England the parties may by reference incorporate some part of foreign law into their contract, which as such, will remain to be governed by the proper law. Thus in the *Dobell v. Steamship Rossmore Co.* case,⁷⁰ a bill of lading incorporated sections of the Harter Act by reference. Kay, J., said, "This bill of lading must be read as if the words of the Harter Act were set out at length in it." Also in *Rowett Leaky and Co. v. Scottish Provident Institution*,⁷¹ there were policies which Astbury, J., declared to be an English contract and construable by English law. The words "bona fide onerous holder" occurred and his Lordship said that he thought expert evidence was admissible to show the precise meaning of the phrase. He eventually decided the case by saying the result was the same whether he looked at the evidence or not. The words quoted above being a common usage in Scots law.

There is no reason why parties in the United States cannot, instead of putting certain specific clauses in their contract, merely refer to a foreign rule of law, if that rule is not contrary to the public policy of the forum.⁷² This would be true of course in states which permit the free choice of law of the parties and those which seek to find the proper law of the contract, but it should also be true in those states applying a rigid rule, for the reason that what the parties are really doing is inserting a particular clause in their contract which should be enforced as any other clause in the contract is enforced.

RENVOL.

If choice of law is taken in the sense that it means nothing more than including into a contract, governed by a de-

⁶⁷ HAUDEK, *op. cit. supra* note 6, at 49 and n. 1, 50; LEWALD, *op. cit. supra* note 32, at 202-207, nn. 262-264; 10 REP. 72, nn. 6-9; RGZ. IPR. RSPR. (1933) n. 21.

⁶⁸ HAUDEK, *op. cit. supra* note 6, at 54, with quotations.

⁶⁹ HAUDEK, *op. cit. supra* note 6, n. 1, quoting OGH. 26.5 (1908); GIUNF XI no. 4249.

⁷⁰ L. 895 2 Q. B. 403.

⁷¹ 42 T. L. R. 331.

⁷² See *supra* note 46.

fixed and unchangeable system of law, of references to a substantially different set of rules of another system, instead of providing for each separate case by special clause containing the material solution of the foreign system, the question of *renvoi* cannot arise. For instance, the parties may feel inclined to provide for the parting of the risk in a sale at a time different from that provided in their own system. They may define this in a number of provisions or they may refer to a set of rules in another system of law which would comply with their wish and would save them the trouble of re-embodiment all these provisions in the form of their contract. In such a case the contract is not taken out of the system of law governing it originally as decided by the law of the forum. But when the parties decide to take the contract as a whole out of that system, including its rules of municipal conflict of laws and public policy upon which the latter insists in all contracts governed by it, then reference to the foreign system of law does not differ at all from the reference by that foreign municipal system of conflicts of law to still another system. This means that we have to consider the question of *renvoi*.

Lewald states that he has only come across three cases in German law dealing with this matter, and in all of them *renvoi* is denied. No other system of law on the Continent has been discovered by us to contain a similar case.⁷³ *Prima facie* one feels inclined to say that if the parties did refer to a system of law, they meant it, and did not consider that this system could refuse to accept the reference to it.⁷⁴ But does this reason not hold as well when the law of the forum itself prefers another system? Perhaps one may say that the parties, when referring to a foreign system of law, made that selection because it was more convenient to them; if the law refers to a foreign system, it does so for the sake of justice and good administration, but it remains always in the background as a subsidiary system, only too willing to lend its

⁷³ At 206, n. 264: OLG. Colmar, 19.5 (1893); (1895) Clunet 141; 4 ZIR. 152; LG. Hamburg, 2.1 (1903); 14 ZIR. 82; 2.1 (1903); OLG. Braunschweig, 7.2 (1908); (1909) Clunet 520; 16 OLG. RSPR. 362.

⁷⁴ 2 ARMINJON, *op. cit. supra* note 6, at 311-312, n. 102; NIBOYET (1927) (I) REC. DES COURS 58/61, whom Arminjon quotes in support of his opinion takes a different view, starting from his conception of *liberté des conventions*."

aid, as municipal law is always ready to be applied by municipal courts. The question of *renvoi*, in the law of contracts, is a comparatively new field, and many countries have not had occasion, as yet, to deal with the matter.

In England a controversy, or rather an extreme doubt, existed for some time as to whether or not the doctrine of *renvoi* was a part of the common law. Four cases⁷⁵ give a rather disputed and none too clear decision on the question. However, both Dr. Cheshire and the late Professor Mendelsohn-Bartholdy held that the doctrine was not part of English law. In the case of *In re Ross*, an English woman who died domiciled in Italy leaving a will valid according to Italian law but void as to English law, Luxmoore, J., held that under English Private International Law the will was good as the *lex domicilii* must apply. This is the same result that would have been reached had the doctrine of *renvoi* been followed, but the court did not follow that line of reasoning.⁷⁶

In the case of *In re Annesley*⁷⁷ Russell, J., had a similar situation of an English woman dying in France, having her *de facto* domicile there. The court here did not accept the remission to English law but applied what may be termed a double *renvoi* and applied the law of the domicile—as a French court would have done it. Although the doctrine of *renvoi*, being a part of English law, was not discussed, the words of the judge do not leave the matter clear. However, the other two cases clearly point out that *renvoi* is not a part of English law and although the decisions since that time have not been in perfect unanimity, writers are inclined to agree that English law has not adopted the doctrine as a ruling principle.⁷⁸

In America there seems to be a dearth of authority on this point, with only two cases in the entire country cited on the principle. The case of *Harral v. Harral*⁷⁹ does not seem

⁷⁵ *In re Ross* (1930) 1 Ch. 337; *In re Annesley* (1926) Ch. 692; *In re Askew* (1930) 2 Ch. 259; *Collins v. Attorney-General* (1931) 145 L. T. 551.

⁷⁶ CHESHIRE, *op. cit. supra* note 38, at 45 *et seq.*; BENDELSONN-BARTHOLDY, *RENOI IN MODERN ENGLISH LAW* 67 *et seq.*

⁷⁷ See note 75, *supra*.

⁷⁸ See note 76, *supra*.

⁷⁹ 39 N. J. Eq. 279 (1884).

to be a real problem of *renvoi*. However, the case of *Carter v. Mutual Life Insurance Co.* not only discussed the question, but the court held that a reference by the parties to the law of New York (from Hawaii) included the whole of the law—conflict of laws as well.⁸⁰ No support seems to have come for the principle laid down in this case although a thorough search of its subsequent history was beyond our power.

The objections against autonomy of will or free choice of law by the parties is two-fold.⁸¹ Firstly, it can be said that it is more than anomalous that instead of the law governing the parties the parties should govern the law. In fact a choice exercised without a system allowing the parties to do so is an invalid attempt at a legislative act. But it may be said with some confidence that there is always a system which *ex poste* determines whether the parties could or could not take their choice. This is the law of the forum which now has jurisdiction over the case on some disputed point of the contract. It may not be very satisfactory to have this question deferred until an actual dispute arises because it is often impossible to determine in advance what the forum will be. It is our opinion that one of the purposes of law is stability through certainty, which certainty cannot be had where free choice is allowed. Secondly, there is a far more serious objection to be dealt with. If the parties are free to take their contract out of one system and to submit it to another, they are empowered to avoid all those rules of municipal law which parties contracting under this system are not entitled to stipulate away.⁸² But then we find a new tendency outlined above to distinguish between absolute free choice of law and *liberté des conventions*. This is a sign that the courts have become aware of a possible solution, namely, free choice of law where the contract is connected with several systems

⁸⁰ *Carter v. Mutual Life Ins. Co.*, 10 Hawaii 559 (1900). However, in the case of *In re Talmadge*, 109 Misc. 696, 181 N. Y. Supp. 336 (1919), the New York court held that reference to another system of law did not include reference to its system of conflicts. See Lorenzen (1910) 10 COL. L. REV. 190.

⁸¹ 2 FRANKENSTEIN, *op. cit. supra* note 6, at 158; NIBOYET, *op. cit. supra* note 6, at 50-69; 2 ARMINJON, *op. cit. supra* note 6, at 253-262, nn. 78-80; LEWALD, *op. cit. supra* note 32, at 199-202, nn. 260-261; HAUDEK, *op. cit. supra* note 6, at 5-6, with references.

⁸² HAUDEK, *op. cit. supra* note 6, at 3; NIBOYET (1927) (I) REC. DES COURS 53-69.

of law and *liberté des conventions* where only connected with one system—connexion having a very wide meaning and including every conceivable test. This, for the reason that it is believed that the law is an institution for the convenience of the parties and therefore that every possible convenience and freedom be given the contracting parties. In the case, therefore, of two Swiss contracting in London it should be permissible for them to stipulate that Swiss law govern the contract inasmuch as they are familiar with the provisions of their own law. In the event of future litigation in the English courts, Swiss law should be applied.⁸³

The *lex loci contractus* is likewise open to criticism. If the contract is concluded between present parties, the rule works smoothly. However, on the Continent, because of the relative smallness of the countries and the great diversity as to nationality and legal rules, this solution results very often in a chance application of a system of law which has no interest in the parties or the subject matter of the contract. For example: two Englishmen on a train traveling through Luxemborg conclude a contract concerning subject matter in England. Under the above rule the contract would be governed according to the law of the place where it was made. In the case of contract concluded between absent parties (*absentes*) it is difficult to determine where the contract has been concluded. A contract concluded by telephone between a Swiss in Geneva, making the offer, and a Frenchman in Paris, accepting the offer, is a contract between present parties (*presentes*) in Swiss law, and *absentes* in French law.⁸⁴ The result is that, according to Swiss law, the residence of the acceptor is where the contract was concluded, while, according to French law, the residence of the offeror where the contract acceptance was received is the place of the making. In the same manner if a contract were made, by previous arrangement through the mail, between a man in Tucson, Arizona, accepting an offer made by a man in Frankfort, Germany, the contract would be concluded—ac-

⁸³ Cf. SCHNITZER, *HANDBUCH DES INTERNATIONAL PRIVATRECHTS* 278-279; MANN, *op. cit. supra* note 66, at 98.

⁸⁴ NIBOYET, *op. cit. supra* note 6, at 87-89; LEWALD, *op. cit. supra* note 32, at 223, n. 279; 2 ARMINJON, *op. cit. supra* note 6, at 267, n. 83; 2 FRANKENSTEIN, *op. cit. supra* note 6, at 153-158.

ording to the law of Arizona when the acceptor there posted his acceptance, while under German law the contract would not be made until the acceptance was received. The result is that a different system of law will be applied depending on where the action is brought. This solution, which might be feasible in the case of common law jurisdictions, is unsatisfactory in Europe.

The *lex loci solutionis* has also come in for its share of attack.⁸⁵ It is again a question of classification (qualification) in the various countries which constitute the eventual forum, coupled with the additional difficulty that even municipal systems are not always unequivocal as to what ought to be understood by the *lexus executionis*.⁸⁶ For example, a contract is made in England for the sale of goods which are to be delivered in several countries. Here performance takes place in any number of places and it is impossible to determine the *lex loci solutionis*. Some courts have attempted to solve this matter by using the place of the breach as the law governing but there may be more than one breach and the difficulty is still with us.⁸⁷ In bilateral contracts the use of this rule may lead to a splitting up of the contract⁸⁸ concerning which we shall have more to say below.

The *lex patria* is suggested, and in a number of places actually applied.⁸⁹ The number of its adherents is small, that of its opponents great.⁹⁰ The foundation of this doctrine is not empirical but rational. Zitelmann, arguing from the point of view of international law, commands nationals through the medium of their state to fulfill their obligations; Frankenstein believes that, primarily, every person is connected only with his *lex patria*. It is not necessary here to go further into this dispute between the national and inter-

⁸⁵ NIBOYET, *op. cit. supra* note 6, at 89; LEWALD, *op. cit. supra* note 32, at 224, nn. 281-285; 2 ARMINJON, *op. cit. supra* note 6, at 268, n. 84; 2 FRANKENSTEIN, *op. cit. supra* note 6, at 132-152; MANN, *op. cit. supra* note —, at 100 sq.

⁸⁶ LEWALD, *op. cit. supra* note 32, n. 285.

⁸⁷ 2 BEALE, *op. cit. supra* note 8, at 1089.

⁸⁸ For in a bilateral contract we find two debtors.

⁸⁹ Czechoslovakia, Austria, Italy, Poland.

⁹⁰ To quote the most outstanding: 2 ZITELMANN, INTERNATIONALES PRIVATRECHT 366; PILLET, TRAITE DE DROIT INTERNATIONAL, p. 441, n. 232; (1896) Clunet 5 sq.; FRANKENSTEIN; ca.: e.g., NIBOYET, *op. cit. supra* note 6, at 85-86; 2 ARMINJON, *op. cit. supra* note 6, at 269, n. 85; LEWALD, *op. cit. supra* note 32, at 229, n. 256 (RGZ. 95-164); SCHNITZER, *op. cit. supra* note 83, at 276.

national schools and further reference may be had in the note.⁹¹

Attaching the contract to the law of the debtor's domicile in cases other than unilateral contracts means again splitting up the contract, but apart from that, the solution is not altogether unsound when it coincides with either the law of the place of making or performing the contract. It is generally considered good legal advice to a client to sue his debtor where he may be found. But this is open to the old objection of rigidity and often being unconnected with the contract, as well as to classification of disputes.⁹²

To submit the contract to the municipal law of the forum is a way out which can only be characterized as rough and regrettable because it would be impossible to determine where the plaintiff would bring his suit.⁹³

This leaves us to deal with proposals brought forward by some of the writers which are not covered by the above discussion. Arminjon, not satisfied with all the splits outlined above—capacity, form, essential validity, etc.—has thought it advisable to suggest a further splitting up of the contract into even more phases of possible litigation (entering into, avoiding, object of a contract, cause, invalidity, nullity).⁹⁴

We adhere to the ideal of the French school, which, in order to save the unity of the contract, deemed the free choice of law by the parties the best method of obtaining that unity. For this reason we cannot accept this proposal as it introduces unnecessary complications without increasing the certainty of the rule. Niboyet has offered a solution which up to a certain point deserves serious consideration. First of all he introduces definite tests similar to the Polish statute

⁹¹ See above note 1a; Balladore-Pallieri (1936) (6) RIVISTA DI DIRITTO PRIVATO 217-54; Ago (1934) (17) RIVISTA DI DIRITTO INTERNAZIONALE 197-232; (1936 (IV) REC. DES COURS 252-278; Gutzwiller (1934) (8) ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 652; 4 MAKAROV, RECHTSVERGLEICHENDES HANDWOERTERBUCH 338. For an enumeration of older writers and writings see: Potu (1913) Clunet 482.

⁹² LEWALD, *op. cit. supra* note 32, at 230, n. 287; SCHNITZER, *op. cit. supra* note 32, at 277; 2 ARMINJON, *op. cit. supra* note 6, at 273; NIBOYET, *op. cit. supra* note 6, at 86; Neumeyer (1925) (32) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 99-101; Cassin (1930) (IV) REC. DES COURS 795, n. 95.

⁹³ NIBOYET, *op. cit. supra* note 6, at 84; SCHNITZER, *op. cit. supra* note 83, at 278; ca. 2 ARMINJON, *op. cit. supra* note 6, at 294, n. 92.

⁹⁴ 2 PRECIS 291 sq.

of 1926⁹⁵ discussed above; *e.g.*, the sale of immovables to be governed by the *lex res sitae* or the place where the thing is situated; state contracts governed by the law of the state; transactions on the stock exchanges and other markets by the law governing such market; retail sales by the *lex loci contractus*, etc.⁹⁶ But once he has reached the stage of having ascertained the law applicable he proceeds to add the privilege of *liberté des conventions*. Another rather imposing objection to the suggestions of Professor Niboyet is that it is almost impossible to determine, especially for a foreign lawyer, what rules of the municipal system of law involved may be stipulated away and what rules may not be so stipulated (or in other words what rules of that Continental system are called *droit impératif* and what are called *droit superlatif*). The solution advanced by the Polish statute has, however, much to be said in favor of it. It is an objective test and avoids questions of classifications by making the rule of law governing the case determinable by the proof of a fact, *e.g.*, the locale of the stock exchange, instead of making it a question of law, *e.g.*, as to what in the particular case might be the *lex loci solutionis*. Such were the tests applied by the Mixed Arbitral Tribunal which, like the Permanent Court of International Justice, has no *lex fori* to apply for classification purposes. The Mixed Arbitral Tribunal applies the objective test in many cases⁹⁷ while the Permanent Court prefers to leave the choice entirely in the hands of the parties. Those solutions appear, from one point of view, to be equally advantageous as they offer a uniform system of law governing the contract as a whole.

CONCLUSIONS.

1. It is our belief that the first and most important step in the solving of these intricate questions is through the me-

⁹⁵ See above 5a; see also INT. LAW ASSN. (1928), proposals cited by NIBOYET, *op. cit. supra* note 6, at 100, n. 1; Nolde (1927) (I) ANN. DE L'INST. DE DROIT INT. 939.

⁹⁶ (1927) (I) REC. DES COURS 91 sq.

⁹⁷ *E.g.*, RECUEIL DES DECISIONS DES TRIBUNAUX ARBITRAUX MIXTES 2, 294; 3, 275; 3,800; 3, 380; 3, 365; 4,268; 4, 315; 4, 321, 82; 5, 168; 5, 349; 5, 779; 5, 14; 5, 1083; 6, 138; 6, 229; 6, 320; 6, 635; 6, 634; 6, 727; 7, 347; 7, 468; 7, 512.

dium of international co-operation by means of convention. This for the reason that such matters as the infinite variety of public policies (*order publique*) and the rules which may be stipulated away by the parties and those which may not be (*droit impératif* and *droit superlatif*) make it obvious that some measure of compromise be effected for the purpose of uniformity.^{97a} Secondly, the law governing contracts lends itself peculiarly to international convention because it contains few if any of those elements of national policy, racial and religious opinion, that have proved themselves to be insuperable barriers to international agreement in the matter of marriage and divorce.^{97b}

2. We believe that free choice of law by the parties is a workable solution provided the system chosen has some connexion, however remote, with the circumstances of the case.

3. In case the parties have not exercised their freedom of choice of law when making the contract, we submit that the proper law of the contract should be applicable as a purely objective test and not by the interpretation of the intention of the parties. By the proper law of the contract we mean that system of law which is most closely connected with the contract. The convention might, if it saw fit, lay down definite factual tests for the determination of the proper law somewhat along the lines of the Polish statute set out above.⁹⁸

4. Formalities of the contract should be governed, in our opinion, either by the law governing the contract or by the *lex loci actus*. If the provisions of either of these systems were complied with, the contract should be regarded as formally valid.

5. The law governing the capacity of the parties to enter into a contract should be governed by the personal law of the parties or by the law of the place where the transaction took place. A man would therefore be capable of contracting, if he were capable according to either of those two systems.

It is to be noted that no reference is made to the system

^{97a} Arr. 14, p. 42; arr. 15, p. 121; cf. TAM 5, 200; 3, 1020.

^{97b} In spite of the resignation expressed by the Institut de Droit International (1927) (III) ANNUAIRE 336.

⁹⁸ *Id.* at 5a.

of law that should govern contract where an attempt at rescission is made on the ground of fraud, error, etc., nor have we discussed the question of illegality. These were conscious omissions as we felt them to be beyond the scope of the present article.⁹⁹

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⁹⁹ At this point the American member must, however reluctantly, make known his dissent from some of the conclusions of his eminent and learned Continental colleagues.

It is his belief that free choice of law by the parties and the so-called "proper law" are theoretically unsound and somewhat destructive in practice. They allow the parties to perform a legislative act—make their own law—an anomaly in the law. He believes that his colleagues have put the cart before the horse and selected these solutions because of the fact that they make it easier for the judge to settle the case. This ignores the fact that it is the purpose of law to prevent litigation, not to settle matters easily after the dispute has already come before the courts. Every case wherein a new rule of law is laid down represents a failure of the law to perform its proper function.

With respect to the "proper law" more particularly, his objection is that it is difficult to determine what the proper law is and so counsel may never, with confidence, say to his client what law will govern the prospective contract in the event of suit. He never knows what the future forum will be and what the judge of that forum will decide the proper law to be. This is far too uncertain for practitioners; however, it may please academics.

The alternate solution with respect to form introduces two possible systems governing an already complicated problem. An Englishman contracting with a Czech who is incapable according to English law, must investigate the intricacies of Czech law to decide whether or not he may enter into a contract. Why introduce the second system at all? Is not the first the best from a commercial and almost every point of view?

Besides the above objections, the dissenter finds himself in fundamental disagreement with his fellows of the Continent on the question of Personal and Territorial Sovereignty and the logical and legal bases of Conflict of Laws. Discussions on this point, however, engendered such considerable heat and such very little light that it was thought best to omit any discussion of the matter and leave each reader to his own opinion.

The American member regrets exceedingly the necessity for this note, but was encouraged to include it by his colleagues in this undertaking who, by force of physical majority, controlled the thought of the textual conclusions and recommendations. He therefore wishes to express his thanks to them for this opportunity to touch on some of the views which he holds so strongly. He also wishes to express his appreciation to Mr. G. G. Tilsley (LL.B., Birmingham) for his invaluable aid in the preparation of the English law included in this paper.

Editor's note: Inasmuch as the completed article arrived from Cambridge, England while the rest of volume XII, number 2, of this review was at press, it was impossible, in the time allowed, to edit the footnotes according to the regular law review form.