

# CONFLICT AVOIDANCE IN INSURANCE

ARTHUR LENHOFF\*

## I

The paradox that has always plagued the theorist and the practitioner in the consideration of the insurance contract in the conflict of laws is the variance in the result which the use of the same "contacts" may produce. The explanation is simple: Insurance law is still state law.<sup>1</sup> Companies, incorporated as they may be in small states, such as Connecticut and Delaware, carry on business with hundreds of thousands of customers whose residences are in other states. Nine out of ten ordinary insurance transactions contain, by virtue of this incidental fact, a foreign element sufficient to bring choice-of-law questions into play. When controversies arise, therefore, the same concept may meet with many different interpretations, depending on the jurisdiction whose law is held to govern.

An illustration: One of the most generally accepted rules seems to be that, absent a statutory rule to the contrary, a contract of insurance is governed with respect to matters of its execution, essential validity, construction, and effect by the law of the place where it was made<sup>2</sup>—the place where occurred the last event necessary to form a binding agreement.<sup>3</sup> The determination of what constitutes this event, however, varies among the several jurisdictions, and this entails conflicts. *Fidelity Mutual Life Association v. Harris*<sup>4</sup> is sufficiently exemplary. There, the life insurance policy, which had been issued at the main office of the insurer in Pennsylvania, was delivered to the applicant in Texas. It contained the usual clause: "The policy shall not be binding until delivery during the lifetime and good health of the

\*D.U.J. 1908, University of Vienna. Member of the New York bar; Distinguished Professor of Law, University of Buffalo School of Law. Onetime Justice of the Austrian Court for Constitutional Matters, and Professor in Vienna.

<sup>1</sup>The upshot of the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944), if read together with the McCarran-Ferguson Insurance Regulation Act, 59 STAT. 33 (1945), 15 U. S. C. § 1011 (1952), is the declaration of the federal government that it is for the states to regulate the business of insurance (as they have done it before), unhampered by federal legislation relating to interstate commerce. Cf. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946); *Robertson v. California*, 328 U. S. 440 (1946). What the *South-Eastern Underwriters* decision achieved was the subjection of interstate insurance transactions to the federal antitrust legislation; and the above act of 1945 created an option for the states, by assuming the corresponding responsibility through legislation of their own, to avert this subjection of their insurance companies to the federal antitrust laws.

<sup>2</sup>See, e.g., I GEORGE J. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 194, at 430 (1931); JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 7079 (1943); McHaney, "*Binding Receipts*" and *Conflict of Laws*, 1947 *INS. L. J.* 206, 207.

<sup>3</sup>E.g., *Ruhlin v. New York Life Ins. Co.*, 106 F. 2d 921 (3d Cir. 1939). See also *RESTATEMENT, CONFLICT OF LAWS* § 311, comment *d* (1935). For scepticism about the worth of such concepts, see the thorough discussion in CHARLES W. CARNAHAN, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS* 26 (1942). For the logical-legal objections to this whole concept, see WALTER W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 363 *et seq.* (1942).

<sup>4</sup>94 *TEX.* 25, 26, 57 S.W. 635, 636 (1900).

applicant and until the first payment due hereon has been made." Relying on this clause, on a false statement in the application, and on the fact that under Texas law such misstatement may be regarded as a breach of warranty effecting a forfeiture, the insurer brought suit to cancel the policy. The Supreme Court of Texas, however, held that such clause did not suspend until delivery the operative effect of the contract where the premium had already been paid and where the applicant, at the date of the issuance of the policy, was in good health. Accordingly, the contract was held to have been made not in Texas, but in Pennsylvania, whose law viewed the critical statements of the applicant only as misrepresentations and required more to effect a cancellation—namely, a showing of the materiality of the misstatement with respect to the risk.

Clearly, then, the outcome of this litigation depended not on the court's choice between two competing concepts or sets of connecting factors asserted by the adverse parties—as, for instance, might have been the case had one party referred to the place of contracting and the other to that of performance—since the court and the parties all seem to have been in agreement that the law of the place of contracting governed. There was a question only as to the meaning of this term, and this was resolved by the court's choice of law.

Even had the court defined the place of making the contract by reference to the place of delivery of the insurance policy<sup>5</sup>—and, in fact, "delivery" of the insurance policy has frequently been so construed<sup>6</sup>—a further conflict might still have arisen, for "the place of delivery varies with the method of delivery."<sup>7</sup> There is some authority that where delivery is by mail, the process of contracting is completed at the moment of mailing, so that a manual surrender to the applicant is no longer essential to effectuate contract;<sup>8</sup> there is other authority that the delivery is only completed at the time when and at the place where the applicant receives the policy.<sup>9</sup> Should the former rationale prevail, the law of the state in which the insurer has its principal place of business demands control; should the latter, the law of the place where the applicant has his residence.

Such diametrically opposed consequences may be drawn from similar choices between meanings of other terms. For example, in the case of binder receipts,

<sup>5</sup> See, e.g., *Ruhlin v. New York Life Ins. Co.*, 106 F. 2d 921 (3d Cir. 1939); *Wilson v. Business Men's Assurance Co. of America*, 181 F. 2d 88 (9th Cir. 1950). We may disregard for the moment terms expressly fixing the coming-into-effect of the transaction with reference to another fact, such as payment of the first premium during plaintiff's good health. See, e.g., *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234 (1912) (place of payment held connecting factor); *Equitable Life Assurance Soc'y v. Clements*, 140 U. S. 226 (1891) (same). For, delivery of the policy to the applicant would, of course, be irrelevant where the fact recognized as concluding the contract had not yet occurred. *Potts v. Metropolitan Life Ins. Co.*, 133 Pa. Sup. 392, 2 A. 2d 870 (1938).

<sup>6</sup> See Carnahan, *The Conflict of Laws in Relation to Insurance Contracts*, in A. B. A. SECTION OF INSURANCE LAW, REPORT OF PROCEEDINGS 58, 60 (1937).

<sup>7</sup> *Edwards v. Commonwealth Mutual Fire Ins. Co. of Pa.*, 197 F. 2d 62, 64 n. 1 (3d Cir. 1952).

<sup>8</sup> RESTATEMENT, CONFLICT OF LAWS § 317 (1934).

<sup>9</sup> E.g., *Mutual Life Ins. Co. of N. Y. v. Johnson*, 293 U. S. 335 (1934); *Faron v. Penn Mutual Life Ins. Co.*, 176 F. 2d 290 (3d Cir. 1949); *United States Mortgage & Trust Co. v. Ruggles*, 258 N. Y. 32, 179 N.E. 250 (1932).

offering—against payment of the first premium—provisional coverage prior to the execution of the definite contract, the question often arises as to the date at which such coverage has been attained. Is it the date of the application or that of approval at the home office of the insurer? The application frequently contains a clause that states that “from the date of this receipt the insurance shall be in force if the application is approved . . . by the home office of the company, and the money for which the receipt is given is sufficient to pay in full the first year’s premium.” The courts in Pennsylvania, Indiana, and Ohio have construed this clause in a manner similar to the Texas court in the *Harris* case, regarding the approval as being merely a retroactively operating condition for coverage, which commences at the time of the application, the place whereof, for this reason, determines the applicable law. The courts in all other states, however, have taken the opposite view, regarding the act, place, and time of the approval as the determinant for the inception of the coverage.<sup>10</sup> To appreciate the significance of this difference in the construction of the same clause, one need only conjure up a case in which the event insured against, such as death, fire, the incident involving liability, and so on, occurred between the two decisive dates.

No doubt, these conflicting results reflect the rift between the interests involved and their differing views on public policy. On the one hand, it may be urged that uniformity of rules is essential for certain types of insurance business, such as that conducted by nation-wide fraternal benefit associations; that it greatly facilitates the calculation of risks; and that diversification of rules increases costs both to the insurers and, particularly because of the prevailing mutual type of insurance, to the insured public.<sup>11</sup> On the other hand, it may be pointed out that a claimant may prevail only under a law other than that of the insurer’s domicile, and that the applicability of such other law, because of the elasticity of such “contact” concepts as “making,”<sup>12</sup> “performance,” and “implied intention” can be established with equal facility.<sup>13</sup> Where, therefore, as is often the case, the forum coincides with the insured’s domicile, the courts have frequently applied the *lex fori*, particularly where it favors the insured,<sup>14</sup> although the contrary is now and then observed.<sup>15</sup> The forum has also resorted to its own law in absence of any assertion of the law of the state which, in view of the forum, controls.<sup>16</sup> It may be helpful at this point to re-

<sup>10</sup> *E.g.*, *Fields v. Equitable Life Assurance Soc’y*, 118 S. W. 2d 521 (Kansas City, Mo., Ct. App. 1938). See also *McHaney*, *supra* note 2, at 206; *Pierson*, *The Conflict Problems in Relation to Insurance Company Management*, in A. B. A. SECTION OF INSURANCE LAW, REPORT OF PROCEEDINGS 80, 82 (1937); *CARNAHAN*, *op. cit. supra* note 3, at 27.

<sup>11</sup> See *Pierson*, *supra* note 10, at 84.

<sup>12</sup> See *Carnahan*, *supra* note 6, at 61.

<sup>13</sup> See *e.g.*, *Mercier v. John Hancock Mutual Life Ins. Co.*, 141 Me. 374, 44 A. 2d 372 (1945).

<sup>14</sup> *E.g.*, *New York Life Ins. Co. v. Orlopp*, 25 Civ. App. Tex. 284, 61 S. W. 336 (1901).

<sup>15</sup> *E.g.*, *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 36 Pac. 113 (1894); *Fields v. Equitable Life Assurance Soc’y*, 118 S. W. 2d 521 (Kansas City, Mo., Ct. App. 1938). *But see* *Mutual Life Ins. Co. of New York v. Cohen*, 179 U. S. 262 (1900) (forum (Montana) had given New York law, favorable to Montana insured and beneficiary, preference over *lex fori*, but Supreme Court reversed).

<sup>16</sup> *E.g.*, *Prudential Insurance Co. of America v. Ruby*, 219 Ark. 729, 244 S. W. 2d 491 (1951).

member, however, that the foregoing discussion presupposes the absence of statutory provisions as to matters of choice of law.

## II

Harmonious criteria for the determination of the law applicable to the matter at issue are, thus, seen to be unsusceptible of attainment through the use of uniform conceptualistic theories. Substantial uniformity within a confederated nation can rather be achieved only where the community is subject to a single system of private law or where the various member states, by compact or by the adoption of definite criteria for the ascertainment of the law governing the particular insurance transaction, have created unitary rules.

Concerning the former, it suffices to refer to the principles of our constitutional system. Generally, not even the determination of the law to be applied by a court is one controlled by the Constitution, for the "doctrines of the conflict of laws . . . being purely a question of local common law [are] a matter with which [the United States Supreme Court] is not concerned."<sup>17</sup> This philosophy also manifests itself in cases of conflict between the legislative policies of sister states, since "the full faith and credit clause does not ordinarily require [a state] to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events."<sup>18</sup>

Adverting to the latter, efforts to reconcile the various judicial approaches to the determination of the applicable law had their effect upon the Section of Insurance Law of the American Bar Association. Each of the Section's two consecutive meetings, the first in Cleveland in 1938,<sup>19</sup> and the second in San Francisco in 1939,<sup>20</sup> was presented with a draft solution. The second draft, which developed more exactly than its predecessor criteria for the allocation of control to the states concerned, emphasized the possibility of uniform provisions in the area of choice of law and noted the trend toward expansion of control by the *lex fori*, which at that time, 1938, was not yet so clearly perceptible as now.

However, the twilight of such gods as *New York Life Ins. Co. v. Head*<sup>21</sup> and

<sup>17</sup> *Kryger v. Wilson*, 242 U. S. 171, 176 (1916).

<sup>18</sup> *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 436-37 (1943).

<sup>19</sup> *Preliminary Draft No. 1, Appendix B to the Report of the Committee on Qualification and Regulation of Insurance Contracts*, A. B. A. SECTION OF INSURANCE LAW, PROGRAM AND COMMITTEE REPORTS 65-67 (1938).

<sup>20</sup> *Second Draft, Appendix B to the Report of the Committee on Qualification and Regulation of Insurance Contracts*, A. B. A. SECTION OF INSURANCE LAW, PROGRAM AND COMMITTEE REPORTS [hereinafter COMMITTEE REPORT] 39, 50 *et seq.* (1939).

<sup>21</sup> 234 U. S. 149 (1914) (Missouri court had applied to life insurance policy, which had been applied for and delivered in Missouri, Missouri nonforfeiture statute that, after three years, keeps policy in force, upon default in both repayment of policy loan and payment of premiums, by using three quarters of premium reserve as single premium and subtracting amount of loan from policy proceeds; Supreme Court, however, held application of Missouri law to be violative of due process, since policy loan agreement had contained stipulation of New York law, and its execution in New York supplied—technically—a criterion for the application of New York law, which applies reserve to satisfaction of loan.)

*New York Life Ins. Co. v. Dodge*<sup>22</sup> was already looming.<sup>23</sup> In any event, *Erie Railroad v. Tompkins*,<sup>24</sup> decided at this juncture, terminated the application of a "general law" of insurance, through which technique the federal courts had, for nearly a century, been able to develop in diversity cases uniform principles and rules that, to some extent, differed from those applied by the courts of the state in which the federal court was sitting.<sup>25</sup> And a few years later, in a significant expansion of doctrine, it was held that a federal court, in true consonance with *Erie Railroad v. Tompkins*, was constrained to follow the conflict-of-laws rule of the state in which the court was sitting.<sup>26</sup>

Returning to the draft, however, in selecting the connecting factors to determine the law applicable to an insurance relationship which has contacts with two or more states, there was adopted as a guiding postulate the idea of a unitary controlling law.<sup>27</sup> In general, it has always been held that an insurance relationship cannot be fragmented, as the scission of a unitary contract, it has been felt, would produce great inconvenience, confusion, and difficulties.<sup>28</sup> The Supreme Court has endorsed this thesis in *Aetna Life Ins. Co. v. Dunken*,<sup>29</sup> holding that the application of the *lex fori* to an insurance relationship subject from its inception to another law would be violative of due process. The draft, therefore, sought to enunciate a set of rules which would, from the outset, advise both the insurer and the insured of the controlling law. Thus, following the theories that underlie provisions enacted by many states,<sup>30</sup> the draftsmen tried to localize an insurance relationship by rating the degree

<sup>22</sup> 246 U. S. 357 (1918) (facts similar to those in *Head* case, *supra* note 21, but Supreme Court's rejection of *lex fori* even more startling, since residence of both insured and beneficiary had always been in state of forum.)

<sup>23</sup> See, e.g., *Cordell v. Brotherhood of Locomotive Firemen and Enginemen*, 208 N. C. 632, 182 S. E. 141 (1935) (*lex fori*, which was also domiciliary law of insured, prevailed over stipulated law of place of insurer's main office and of issuance of policy). Carnahan, *supra* note 6, at 63, observes that the decision in *Mutual Life Insurance Co. of New York v. Liebman*, 259 U. S. 209 (1922) (recognizing the application of *lex fori* to policy loan agreement made elsewhere) may possibly be taken as overruling "impliedly" the *Head* case and the *Dodge* case. And long before these decisions, the Court had recognized that the forum may reject the application of a law selected by the parties, where contrary to the compulsory provisions of the *lex fori*. *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1900).

<sup>24</sup> 304 U. S. 64 (1938).

<sup>25</sup> E.g., federal courts, unlike most state courts, recognized suicide of the insured as a defense, even where the policy was silent on the point. *Ritter v. Mutual Life Ins. Co.*, 109 U. S. 139 (1898). For discussion of the contrary attitude of the state courts, see WILLIAM R. VANCE, *CASES ON THE LAW OF INSURANCE* 296 (3d ed. 1940).

<sup>26</sup> *Sampson v. Channell*, 110 F. 2d 754 (1st Cir. 1940), *cert. denied*, 310 U. S. 650 (1940) (tort case); *Klaxon v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941) (right to interest on judgment in contract action); *Griffin v. McCoach*, 313 U. S. 498 (1941) (Texas concept of effect of local public policy on question of what law is applicable to claims of assignees of beneficiaries without interest in the life of insured held operative). Also see generally COOK, *op. cit. supra* note 3, at 108 *et seq.*

<sup>27</sup> COMMITTEE REPORT, *op. cit. supra* note 20, at 39 *et seq.* See also, Patterson, *The Conflict Problems in Relation to Insurance Regulatory Statutes*, in A. B. A. SECTION OF INSURANCE LAW, REPORT OF PROCEEDINGS 69, 75 (1937).

<sup>28</sup> See MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW* 423, 453 (2d ed. 1950).

<sup>29</sup> 266 U. S. 389 (1924) (conversion of seven-year term life insurance policy into twenty-payment life insurance policy does not change governing law from that of Tennessee to that of Texas, although application for conversion emanated from Texas, where insured had moved from Tennessee).

<sup>30</sup> For more detailed examination of these statutes, see part IV *infra*.

of the interest of each of the states concerned and placing control of the relationship in the state that seemed to have the paramount interest. In this manner, the residence of the person whose life, health, or bodily safety was the subject of the contract, was designated as the point of contact for the allocation of life, accident, or health insurance contracts; property insurance contracts were to be localized in the state of the situs as far as real property and personal property having a fixed location were concerned; and as for automobile insurance, the place where the vehicle was principally garaged or used was regarded as the most appropriate connecting factor.<sup>31</sup>

These illustrations bespeak the courageous attempt made to replace conceptualistic criteria, traditional for the choice of law in the field of contracts, by new tests derived from a particular state's primary connection with and, therefore, interest in the risk insured.<sup>32</sup> Moreover, these tests were so logically and practically sound that even at that time, when the doctrine of *Hartford Accident and Indemnity Co. v. Delta and Pine Land Co.*<sup>33</sup> had not yet expended its force, they could hardly have been challenged from the standpoint of due process. Nevertheless, the draftsmen, taking into account the likelihood that not all the states would adopt the new tests, preserved to the nonconforming forum the resort to such conceptualistic points of contact as the place of delivery of the policy or of its issuance.<sup>34</sup>

Much as this draft needed supplementation and improvement, however, it was never given due consideration, since even its original sponsors had come to query "the necessity" for a uniform statute.<sup>35</sup> And after an ABA Round Table on the draft in 1940,<sup>36</sup> one year later, the project was declared "abandoned."<sup>37</sup>

### III

There are two other means, however, of subjecting an insurance transaction to the same substantive rules, irrespective of the forum in which the case is to be heard. The first, which has long been used in this country, is the insertion of a clause in the insurance contract specifying that it shall be governed by the law of a named jurisdiction, for example, that of New York. What effect has such a stipulation in an insurance contract? The answer involves the great conflict-of-laws problem usually stated in terms of the alternative "autonomy of the parties" v. "predestined law,"<sup>38</sup>

<sup>31</sup> COMMITTEE REPORT, *op. cit. supra* note 20, § 1. In this article, the terms points of contact, connecting factor, and points of reference are used indiscriminately since they have the same meaning; they are the criteria, tests, or legal theories for the determination of the applicable law. *Cf. WOLFF, op. cit. supra* note 28, at 99.

<sup>32</sup> See 3 ERNST RABEL, *THE CONFLICT OF LAWS* 326 (1950).

<sup>33</sup> 292 U. S. 143 (1934).

<sup>34</sup> COMMITTEE REPORT, *op. cit. supra* note 20, § 2.

<sup>35</sup> See A. B. A. SECTION OF INSURANCE LAW, *REPORT OF PROCEEDINGS* 19 (1939). *Cf. 3 RABEL, op. cit. supra* note 32, at 326: "The draft has been abandoned because of opposition from a number of representatives of insurance companies."

<sup>36</sup> A. B. A. SECTION OF INSURANCE LAW, *REPORT OF PROCEEDINGS* 176 (1940).

<sup>37</sup> A. B. A. SECTION OF INSURANCE LAW, *REPORT OF PROCEEDING* 2 (1941).

<sup>38</sup> Rabel, a strong defender of the autonomy principle, refers to these terms. 2 RABEL, *op. cit. supra* note 32, at 360 *et seq.*

or "subjective" v. "objective" theory.<sup>39</sup> That is to say, weighing against the principle that the parties to an insurance contract may autonomously determine the law applicable to it (*lex causae*), there is the notion of a predestined local law as the *lex causae* which determines the essential validity as well as the construction and the effects of a valid contract.

In the field of insurance law, the autonomy rule has never gained a wide following in this country, except in a few isolated areas. This may be explicable in light of the fact that the elements which in our legal system set off insurance contracts from other contracts point to more than differences in subject matter. The terms of the latter arise out of a bargaining process, while those of the former, to a great extent, have been fixed beforehand. This is as true now as it has been in times past, the only difference being that where formerly the insurers had prescribed the terms of a life, fire, or accident policy, and so on, the government now does it.

It is unnecessary to elaborate the manner in which many insurers in an era long past, by means of equivocal terms, abused their economic superiority over a more or less helpless, if not guileless, public; how administrative nihilism was necessarily stimulated into administrative regulation; and how insurance became one of the most highly regulated industries in the American economy.<sup>40</sup> It suffices to observe that "because of the fact that insurance vitally affects the public interest,"<sup>41</sup> states, in the exercise of their police power, have enacted insurance statutes for the purpose of protecting the public from questionable practices. The provisions of such statutes must be extremely rigid; their norms are imperative and compulsory in nature; and, therefore, no clause in an insurance policy can be permitted to bargain them away.<sup>42</sup> No public policy can be expressed more strongly by a state than that set forth in such regulatory provisions enacted for the benefit of its residents. Nor can the judicial branch of the government in such a state be permitted to disregard the protective norms of its own insurance law and to apply against a resident the provisions of a foreign insurance law, such as that of the foreign insurer's domicile, because of a clause to that effect in the policy. This was forcefully underscored by the Supreme Court in *Equitable Life Assurance Soc'y v. Clements*<sup>43</sup> and *New York Life Ins. Co. v. Cravens*<sup>44</sup> at a time when substantial differences in the insurance laws of the home state of the insurer on the one hand, and those of the forum and of the domicile of the insured on the other were first bringing into sharp relief the demand by the

<sup>39</sup> Cf. ARTHUR NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 157 *et seq.* (1943).

<sup>40</sup> See generally Brook, *Public Interest and the Commissioners'—All Industry Laws*, 15 *LAW & CONTEMP. PROB.* 606 (1950).

<sup>41</sup> *United States v. Sentinel Fire Insurance Co.*, 178 F. 2d 217, 229 (5th Cir. 1949). See also 5 SAMUEL WILLISTON, *CONTRACTS* § 1765 (1937) and *RESTATEMENT, CONTRACTS* § 580(2)(d) (1932).

<sup>42</sup> For more detailed treatment, see Lenhoff, *Optional Terms and Required Terms in the Law of Contracts*, 45 *MICH. L. REV.* 39 (1946).

<sup>43</sup> 140 U. S. 226 (1891) (applicability of Missouri nonforfeiture statute, discussed in note 21, *supra*, where law of New York stipulated in policy).

<sup>44</sup> 178 U. S. 389 (1900) (fact situation similar to that of *Clements* case in note 43, *supra*).

forum that its regulatory laws control insurance relationships involving its residents, regardless of the stipulated subjection of the relationship to another law.<sup>45</sup>

Obviously, recognition of this demand by numerous federal and state courts<sup>46</sup> has had a bearing upon uniformity and, for this reason, predictability regarding the question of the controlling law. An illustration: An automobile collision insurance policy covering any trip made within the United States has been issued at the insurer's main office in State *A*, where there prevails the common-law rule of insurance that any statement of a fact as of the date of the issuance of the policy is an affirmative warranty, and that the failure to fulfill it literally affords a complete defense to insurer, irrespective of the materiality of the failure to the risk. The policy contains, in accordance with the answers given by the insured owner in the application form, the statement that the automobile is garaged in State *B*, the owner's domicile, a state that has abolished the common-law rule and replaced it by a rule requiring materiality of the breach to the loss claimed. An injurious collision occurs in State *C*, where the owner, a traveling salesman, has temporarily garaged his car. Assuming even that the policy contains a clause subjecting it to the law of *A*, the forum in *B* will, nevertheless, apply its law on warranties and not that of *A*.<sup>47</sup> Illustrations of misstatements made in applications for life or accident insurance may be more striking,<sup>48</sup> but since any probability is relative,<sup>49</sup> an inference drawn from an instance offering a degree of probability of less than the highest—*a minori ad maius*—seems to be rationally conclusive.<sup>50</sup>

It may well be, of course, that many provisions of the stipulated law will be held applicable. It has been suggested that even if the forum refuses to apply certain

<sup>45</sup> Needless to say, in favor of its own domiciliary, the insured, the forum will apply its law expressly stipulated as applicable, although conceptually the contract might be regarded as "made" elsewhere. *E.g.*, *Columbian National Life Ins. Co. v. Keyes*, 138 F. 2d 382 (8th Cir. 1943).

<sup>46</sup> *E.g.*, *Union Mutual Life Ins. Co. of Iowa v. Bailey*, 99 Colo. 570, 64 P. 2d 1267 (1937) (policy provision specifying control by domiciliary law of insurer held invalid; contract controlled by domiciliary law of insured); *Blackwell v. Mutual Reserve Fund Life Ass'n*, 141 N. C. 117, 53 S. E. 833 (1906) (policy provision referring to law of home office of insurer held void; law of domicile of insured and place of application controls); *accord*, *Albro v. Manhattan Life Ins. Co.*, 119 Fed. 629 (C. C. D. Mass. 1902); *Dolan v. Mutual Reserve Fund Life Ass'n*, 173 Mass. 197, 53 N. E. 398 (1899). See also *Saunders v. Union Central Life Ins. Co.*, 212 Mo. App. 186, 253 S. W. 177 (1923) (facts similar to those in *Clements* and *Cravens* cases, notes 43 and 44 *supra*); *New England Mutual Life Ins. Co. of Boston v. Olin*, 114 F. 2d 131 (7th Cir. 1940) (forum applies in favor of resident insured its antiforfeiture statute and not foreign law stipulated in policy); *Keeley v. Mutual Life Ins. Co. of New York*, 113 F. 2d 633 (7th Cir. 1940) (*lex fori*, which was also domiciliary law of insured, applied rather than law stipulated in policy).

<sup>47</sup> Compare *Dawsons Ltd. v. Bonnin*, [1922] 2 A. C. 413, with *Karp v. Fidelity-Phenix Fire Ins. Co.*, 134 Pa. Super. 514, 4 A. 2d 529 (1939).

<sup>48</sup> Many statutes direct that, with respect to these types of insurance, statements of facts in the application shall not be regarded as warranties and misstatements shall avoid the contract only if they are material. See, *e.g.*, N. Y. INS. LAW §§142, 149 (1949). See also cases cited by Carnahan, *supra* note 6, at 61 n. 11, in which the courts whose laws exhibit this modern pattern, have disregarded the clause directing control by the law of the insurer's domicile.

<sup>49</sup> See MORRIS R. COHEN, A PREFACE TO LOGIC 100 *et seq.*, 116 *et seq.* (1944).

<sup>50</sup> Where the domiciliary state of the insured has not yet regulated its law of warranties, another forum, whose law has already been modernized by statute, has no reason to disregard the stipulated law which likewise lacks protective features. See Carnahan, note 6 *supra*, at 62 n. 12.



rules of the stipulated law, that law, nevertheless, still controls the transaction.<sup>51</sup> It is one thing to say that the forum may properly refuse, for reasons of public policy, to aid in the enforcement of foreign-created rights; for the party claiming these rights may take its chances in another forum.<sup>52</sup> It is quite another thing, however, for the forum to attempt to replace with terms sanctioned by its own law contractual terms valid under a foreign law whose control over the transaction properly cannot be disputed by the forum; for by so doing, the forum would actually rewrite the contract and destroy rights without offering any compensation.<sup>53</sup>

These difficulties are resolved, however, by the realization that the forum may deny enforcement of a foreign rule and apply its own for reasons other than those of public policy. Such, indeed, is the case where the substantial interest of the forum is evinced by the residence of the insured, which, moreover, frequently coincides with the place of the application for and delivery of the policy.

Not all of the rules of the forum belong to the class of imperative norms which exhibit a strong public policy and may not be waived;<sup>54</sup> and to the extent that they are rather optional or pliable norms,<sup>55</sup> the parties are at liberty to supplant them by those of their own choosing, such as those of a foreign law.<sup>56</sup> Accordingly, a stipulation of foreign law is not necessarily devoid of significance,<sup>57</sup> but in so far as this foreign law is inconsistent with the "unwaivable"—*i.e.*, compulsory—norms of the law governing the transaction, it must yield thereto.<sup>58</sup>

From what has been said, it follows that the forum will recognize the chosen law as controlling in various situations:

In the first place, the chosen law may be that of the forum itself.<sup>59</sup>

In the second place, if the chosen law is other than that of the forum, a substantial

<sup>51</sup> 2 RABEL, *op. cit. supra* note 32, at 414. The authority upon which Rabel relies is a broad statement in 1 COUCH, *op. cit. supra* note 2, § 199, and the *Head* and *Dodge* decisions. It is doubtful whether, in 1931, this authority adequately supported such a suggestion; the picture is different, however, in 1956. See part IV *infra*.

<sup>52</sup> *Home Insurance Co. v. Dick*, 281 U. S. 397 (1930).

<sup>53</sup> *Cf. Cook, op. cit. supra* note 3, at 126, where issue is taken with *Griffin v. McCoach*, 313 U. S. 498 (1941).

<sup>54</sup> *Cf. Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 501 (1907): ". . . mandatory statute which the parties have no power to alter or abrogate."

<sup>55</sup> See Lenhoff, *supra* note 42, at 41; NUSSBAUM, *op. cit. supra* note 39, at 161.

<sup>56</sup> See G. C. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 209 (4th ed. 1952); NUSSBAUM, *op. cit. supra* note 39, at 162. Such an incorporation is nothing more than the parties' creation of contractual terms (contractual-terms reference) in contrast to choice-of-law reference. The latter presupposes recognition of the autonomy rule, for by the reference, the stipulation becomes the determinant for the law applicable to the insurance relationship.

<sup>57</sup> *E.g.*, *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551 (1904). *Cf. N. Y. Ins. Law* § 143 (1949). *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416 (1921).

<sup>58</sup> *E.g.*, *Saunders v. Union Central Life Ins. Co.*, 212 Mo. App. 186, 253 S. W. 177 (1923); *New England Mutual Life Ins. Co. of Boston v. Olin*, 114 F. 2d 131 (7th Cir. 1940); *Union Mutual Life Ins. Co. v. Bailey*, 99 Colo. 570, 64 P. 2d 1267 (1937); *New York Life Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284, 61 S. W. 336 (1901). See also Schnitzer, *Freedom of Contract and Choice of Law*, 19 SCHWEIZER JURISTEN ZEITUNG 456 (1953) (in German): "In case the parties authorized by the *lex causae* to select a law want to make such a selection, they are able to do it only to the extent the compulsory provisions of the *lex causae* do not demand observance."

<sup>59</sup> See, *e.g.*, *Columbian National Life Ins. Co. v. Keyes*, 138 F. 2d 382 (8th Cir. 1943).

connection—much closer than that of the forum—will justify the chosen law's claim of control over the transaction.<sup>60</sup> Where the proximity of connection is not beyond any reasonable doubt, adroit draftsmen might insert into the policy an additional clause to the effect that if a term or condition of the policy is at variance with a statute of another state, the conflicting provision shall be regarded as inoperative in such state and the law of the state shall apply.<sup>61</sup>

In the third place, one must realize that not all fields of insurance have been subjected to extensive regulatory laws concerning prohibitory rules and compulsory terms and conditions of the contract as have such mass types as life, accident, health, automobile, and fire insurance. For these types, the standardized mass contract form which necessarily is used is either authorized or prescribed by the government because the parties are not of equal bargaining power.<sup>62</sup> However, there has never been a serious objection to an express stipulation of the applicable law in the field of maritime (ocean-marine) insurance<sup>63</sup> or re-insurance.<sup>64</sup> The reason for maintaining the principle of freedom to bargain here is the fact that the prospect's bargaining power is equal to that of the insurer. Another reason lies in the great degree of uniformity of the rules of marine insurance law all over the world. Thus, a carrier by sea might get all the protection that is possible by his bargaining with the marine insurer and, consequently, he will not offer strong resistance to a stipulation expressly adopting the law of the underwriter's business domicile.<sup>65</sup> In this connection, one often finds in ocean-marine policies a general reference to English law,<sup>66</sup> or a specific reference to the English Insurance Act of 1906<sup>67</sup> and the conditions and usages of Lloyds.<sup>68</sup>

A further factor preventing disputes over the applicable law in the field of ocean-marine insurance is that the courts have either assumed that the control by English law was in the mind of the parties,<sup>69</sup> or, in absence of judicial rules fashioned by the

<sup>60</sup> See, e.g., *Dougherty v. Equitable Life Assurance Soc'y*, 266 N. Y. 71, 193 N. E. 897 (1934); cf. *Mutual Life Ins. Co. of N. Y. v. Cohen*, 179 U. S. 262 (1900).

<sup>61</sup> Cf. *Taggart v. Security Ins. Co. of New Haven*, 277 App. Div. 1051, 100 N. Y. S. 2d 563 (2d Dep't 1950); *Duncan v. Ashwander*, 16 F. Supp. 829 (W. D. La. 1936); *Sheehan v. Lewis*, 218 Wis. 588, 260 N. W. 633 (1935).

<sup>62</sup> See generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

<sup>63</sup> See Ehrenzweig *supra*, at 1084. Cf., *inter alia*, N. Y. INS. LAW § 143(2) (1949), which expressly exempts marine insurance contracts from the control by the compulsory provisions.

<sup>64</sup> Cf. N. Y. INS. LAW § 140 (1949). See also *Citizens Casualty Co. v. American Glass Co.*, 166 F. 2d 91 (7th Cir. 1948).

<sup>65</sup> For a clause typically found in ocean-marine insurance contracts, see, e.g., *Canton Insurance Office v. Woodside*, 90 Fed. 301 (9th Cir. 1898).

<sup>66</sup> See, e.g., *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416 (1921) (argument that stipulation of English law was void—and if valid, ineffective to extent that it varied *lex fori*—rejected by the court). See also Note, *International Divergencies in Marine Insurance Law: The Quest for Certainty*, 64 HARV. L. REV. 446 (1951).

<sup>67</sup> 6 EDW. 7, c. 41.

<sup>68</sup> See 2 RABEL, *op. cit. supra* note 32, at 379.

<sup>69</sup> E.g., *Compania Transatlantica Centroamericana, S. A. v. Alliance Assurance Co.*, 50 F. Supp. 986 (S. D. N. Y. 1943).

Supreme Court, looked to that law because, as Mr. Justice Holmes, speaking for the Court in *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co.*, stated, "there are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."<sup>70</sup> Generally speaking, the particular clauses characteristic of ocean-marine insurance originated in England, where the most important maritime insurer in the world, Lloyds, has its place of business.<sup>71</sup> Naturally, some divergencies have developed in matters such as the requirements for the assumption of a constructive total loss of the ship,<sup>72</sup> and in clauses such as "nearest cause of loss," the construction of which cannot be separated from the facts of the individual case.<sup>73</sup> Apart from these minor variations, however, uniform ocean-marine insurance rules have come into general use. As an illustration, one need only mention the York-Antwerp Rules on the prerequisites for the right to, and the method of computation and adjustment of general average.<sup>74</sup>

Recently, however, in *Wilburn Boat Co. v. Fireman's Fund Insurance*,<sup>75</sup> the Supreme Court referred to state law as the supplier of an applicable rule for maritime insurance. The policy in question covered fire losses involving a small boat used for the carriage of passengers over an inland lake between Texas and Oklahoma. The point in issue was whether materiality was a prerequisite for forfeiture in the case of a breach of a warranty. The Court, speaking through Mr. Justice Black, in the absence of a federal rule, either statutory or decisional, refused to "fashion" one and applied instead Texas law, which insists on that prerequisite. Concurring in the result, Mr. Justice Frankfurter pointed to "the demands of uniformity relevant to maritime law" and held the disregard of them justifiable only because of the "limited situation" characterized by the fact that the object insured was a "houseboat" confined to the waters of Lake Texoma. Query: Shall counsel in a future case involving a vessel serving shipping in its national or international (in contrast to parochial) aspects base his advice on forty-eight different laws rather than on the possibility of a Supreme-Court-fashioned rule inspired by English experience?

Inquiring further into the media which serve to ensure conformity, we turn to the process of standardization of the contents of insurance policies. This process originated for the purpose of protecting insurers from the public practice which had developed of insuring the same property interest against fire with two or more com-

<sup>70</sup> 263 U. S. 487, 493 (1924). See also Mr. Justice Frankfurter dissenting, in *Standard Oil Co. of New Jersey v. United States*, 340 U. S. 54, 61 (1950); *cf. inter alia*, *Aetna Insurance Co. v. United Fruit Co.*, 92 F. 2d 576, 580 (2d Cir. 1938); *Mellon v. Federal Ins. Co.*, 14 F. 2d 997, 1004 (S. D. N. Y. 1926); *Compania Maritima Astra, S. A., v. Archdale*, 134 N. Y. S. 2d 20 (Sup. Ct. 1954).

<sup>71</sup> Most American ocean marine policies today still substantially follow the Lloyds' policy of 1779.

<sup>72</sup> For detailed examination of this divergence, consult authorities cited in note 66 *supra*. *Cf. Calmar S. S. Corp. v. Scott*, 345 U. S. 427 (1953).

<sup>73</sup> See, *e.g.*, *Link v. General Insurance Co. of America*, 56 F. Supp. 275 (W. D. Wash. 1944); *cf. Standard Oil Co. of New Jersey v. United States*, 340 U. S. 54 (1950).

<sup>74</sup> Last revised in 1950.

<sup>75</sup> 348 U. S. 310 (1955).

panies. Differences in terms and conditions produced controversies and litigations.<sup>76</sup> The insurance commissioners, in turn, became interested in the clarification of policy terms and conditions. Finally, the legislatures intervened by enacting statutes which prescribed a uniform policy.<sup>77</sup> The New York fire insurance policy, in its last revised form, has been adopted in forty-five states. The remaining three states, Massachusetts, Minnesota, and New Hampshire, have followed a policy form developed by the first mentioned state. For this reason, it makes little difference which law a forum applies.

Although there is no statutory form for the "combined" automobile insurance, it has been estimated that between seventy and seventy-five percent of total automobile liability insurance has the same standardized terms and conditions.<sup>78</sup> And the situation in the field of accident and health insurance is much the same. Enough has been said about the trend towards uniformity to demonstrate the significance of this matter for the subject of this study.

#### IV

Wherever a foreign insurer has engaged in local activities, the basis for jurisdiction in personam over the insurer has, with different formulations, varying in time, been recognized for the last one hundred years.<sup>79</sup> On the one hand, therefore, the insured or his privies can catch the insurer in the state of the insured's residence; on the other hand, the insurer, in the role of plaintiff, must bring its action against the insured in the same state. These jurisdictional concepts may well explain the efforts undertaken by so many states to establish statutory choice-of-law rules which secure the application of the domestic insurance law—*i.e.*, control by the *lex fori*—over matters involving their residents as insured parties. Although there is, of course, a distinction between such control-securing statutes and other regulatory statutory mandates—the former prescribe choice-of-law rules, while the latter enunciate rules of domestic law—they are closely related functionally; the former secures the control of the latter over insurance transactions over which another system of law might otherwise claim control.

The statutes in question can be divided into two groups: The first identifies some facts (which otherwise have not necessarily been regarded as determinants for the choice of law) as connecting factors. Thus, for example, a Massachusetts statute directs that the rules of its insurance law must unqualifiedly be made the basis of

<sup>76</sup> See the illuminating article of Hedges, *Improving Property and Casualty Insurance Coverage*, 15 LAW & CONTEMP. PROB. 353 (1950).

<sup>77</sup> *Id.* at 358.

<sup>78</sup> *Id.* at 360. A new general revision of the standard provisions for such policies, called "Standard Automobile Policy," was made in 1955 by the National Automobile Underwriters Association.

<sup>79</sup> It is characteristic that the first decision dealing with the problem of jurisdiction over foreign corporations concerned an insurance company. *Lafayette Insurance Co. v. French*, 59 U. S. (18 How.) 404 (1856), originated the "consent" theory. For the further theoretical development, see the discussion in *International Shoe Company v. Washington*, 326 U. S. 310 (1945). See also Lenhoff, *The Peculiar Conflict-of-Laws Problems in the Recent American Law of Insurance*, in INTERNATIONAL LAW OF INSURANCE, Festschrift für Albert Ehrenzweig Senior 153, 156 *et seq.* (1955) (in German).

any insurance contract either on any property or interest or lives in the commonwealth or with any resident of the commonwealth.<sup>80</sup> Contracts at variance with these rules are forbidden. More or less alike, in this respect, are the laws of Arizona, California, Montana, Virginia, Washington, and Wisconsin.<sup>81</sup> It should be noted that under this kind of statute—unlike, for example, that of New York<sup>82</sup>—it is irrelevant whether the final act making an agreement a binding contract takes place in the commonwealth, or whether the policy was issued or delivered therein.

The second group of statutes is characterized by the use of an ordinary connecting factor, such as "place of making the contract," but definition of the factor is so home-made as to be at variance with the traditional concepts. It is quite apparent that the purpose of using artificial criteria for a spatial connection is the "localization" of the transaction within the territorial realm of the statute.<sup>83</sup> Within this group, we may discern four subgroups, each distinguished by the particular fact which is statutorily treated as being determinative of the "place of making the contract."

The particular fact distinguishing the first subgroup is the place where the prospect's application for the contract has been made. Alabama and North Carolina have such an insurance statute.<sup>84</sup>

In determining "the place of making" by the citizenship or residence of the person to whom a "contract of insurance is payable," the legislation of Texas represents the second subgroup.<sup>85</sup>

In the third group, the local activity of a resident agent comes to the fore. Thus, a Maine statute provides that any insurance contract shall be regarded in all respects as having been made where effected by the agent.<sup>86</sup> Thus, in *Mercier v. John Hancock Mutual Life Ins. Co.*,<sup>87</sup> a recent Maine case, where the defendant insurer, a Massachusetts company, urged the applicability of the law of Massachusetts, where the final and binding act—viz., the acceptance of the application—took place, the argument was rejected. The court justified its application of the *lex fori*, upon the ground that a foreign insurer cannot avoid the effect of the statute which, in exact terms, is designed to apply to the insurer's contracts, by asserting that they were not

<sup>80</sup> MASS. ANN. LAWS c. 175, §3 (1948).

<sup>81</sup> For citations, see McHaney, *supra* note 2, at 221.

<sup>82</sup> N. Y. INS. LAW §143(2) (1949). This statute refers to a combination of criteria as factors subjecting contracts concerning life, accident, health insurance, on the one hand, or property and liability insurance, on the other, to New York law. These criteria are issuance or delivery of the contracts or policy in New York, combined with residence of the insured, or situs of the property, or locus of the tortious act, respectively.

<sup>83</sup> Hence the name "localizing" statutes. Cf. Note, *Validity of Statutes Localizing Insurance Contracts*, 13 N. C. L. REV. 213 (1935).

<sup>84</sup> ALA. CODE tit. 28, §310 (1941); N. C. GEN. STAT. §58-28 (1943).

<sup>85</sup> TEX. REV. CIV. STAT. ANN. art. 21.42 (1952). By a statute of South Carolina, CODE OF LAWS OF S. C. 1942 §7773, the taking or receiving of premiums or other charge on consideration from a citizen or a domiciliary corporation in relation to an insurance contract is declared to be the making and the performance of such contract in the state.

<sup>86</sup> ME. REV. STAT. c. 56, §55 (1944). The statutes of Colorado, COLO. STAT. ANN. c. 87, §75 (1935), and Utah, UTAH CODE ANN. tit. 43, c. 3, §23 (1943), follow more or less the same line.

<sup>87</sup> 141 Me. 374, 44 A. 2d 372 (1945).

executed in the state. Furthermore, the court pointed out that whether or not the . . . policy was technically a Maine or a Massachusetts contract . . . the company is responsible for the acts of an agent licensed in the state, in connection with an application procured there from a resident thereof when our statute says that the agent stands in the place of the company.

In other words, with or without the aid of the statute, the forum insisted that its rules of compulsory character, designed to protect its own residents, must control a business transaction "procured" by a local agent.<sup>88</sup> Incidentally, in another state, for the same reasons, the concept of "agent" was also transformed by statutory legerdemain which makes a person who is employed by the prospective insured to procure insurance for him and is paid by him—the agent of the insurer.<sup>89</sup> The Supreme Court found no fault with this use of homonyms, otherwise a favorite type of riddles, in the province of law. In *American Fire Ins. Co. v. King Lumber & Mfg. Co.*, it thus held that a state may "regulate a foreign insurance company when the latter comes to the former to do business with the citizens of the state and their property."<sup>90</sup> No wonder the *Mercier* case leally followed *King Lumber*.

Statutes of the fourth and last subgroup provide that "all contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein." The statutes of Minnesota, Mississippi, North Carolina, and Oklahoma fall within this group.<sup>91</sup> This statutory formulation clearly is broad enough to embrace both substantial and trivial connections of an insurance relationship with the state. Its inherent fundamental defect, however, is illustrated in *Turner v. Liberty Mutual Ins. Co.*<sup>92</sup> There, a federal court, sitting in North Carolina, refused to adopt the plaintiff's theory that North Carolina insurance laws control an automobile liability insurance policy where the fact that the collision had occurred in North Carolina was the only factor which connected it with the state—insurer and insured alike being residents of states other than North Carolina, and the place of application, issuance, and delivery of the policy being New Jersey. The root of the difficulty lay in the statute's loose use of an intangible in the abstract—"interests in this state"—as a criterion for the "localization" of another "intangible"—an insurance contract. The statutory command, using an abstraction, such as "interests," must, lest it be meaningless, point to an object ("referent") to which the abstraction refers.<sup>93</sup> That is to say, there is no difficulty in finding meaning in the statutory localization of "land" and "lives" because they are physical objects of sufficiently "concrete par-

<sup>88</sup> Cf. *Sebesta v. Order of United Commercial Travelers*, 117 N. Y. S. 2d 750 (Sup. Ct. 1952), and —no insurance case—*Mallory Associates v. Barving Realty Co.*, 300 N. Y. 297, 90 N. E. 468 (1949).

<sup>89</sup> 3 FLA. COMP. GEN. LAWS ANN. §6222 (1927).

<sup>90</sup> 250 U. S. 2, 12 (1919), *affirming*, 74 Fla. 130, 77 So. 168 (1917), which turned upon the Florida statute cited in note 89 *supra*.

<sup>91</sup> MINN. STAT. ANN. §60.28 (1946); MISS. CODE ANN. tit. 22, §5633 (1942); N. C. GEN. STAT. §58-28 (1943); OKLA. STAT. ANN. tit. 36, §2 (1953).

<sup>92</sup> 105 F. Supp. 723 (E. D. N. C. 1952).

<sup>93</sup> See ARTHUR LENHOFF, COMMENTS, CASES, AND OTHER MATERIAL ON LEGISLATION 701 *et seq.* (1949).

ticularity,"<sup>94</sup> but the meaning of an abstraction such as "interests," without a reference to a specific object, is boundless.<sup>95</sup> Does "interests" in the state embrace anything from a liability arising from an incident therein or from a loss suffered by an employer as result of a fraudulent act of an employee, down to a damaging event affecting goods in transit or merchandise continuously changing in quantity or location and covered by a floating insurance?

The above decision answered the question as to liability arising out of a collision in the state in the negative. The Supreme Court did likewise with regard to defalcations committed in Mississippi by an employee whose employer was insured through a surety (fidelity) bond issued and delivered by the insurer in Tennessee, where the employer carried on its business. These—in a nutshell—were the facts of the famous case, *Hartford Accident & Indemnity Co. v. Delta and Pine Land Co.*<sup>96</sup> Proceeding upon the theory that the application by the Mississippi forum of its localizing statute<sup>97</sup> to the insurance contract at issue violated due process of law, the Court said:<sup>98</sup>

. . . the state of the forum [may not] convert . . . contracts elsewhere validly consummated . . . for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract. . . .

It is doubtful that the Court would still, in 1956, couch its decision in the same conceptualistic terms which could induce readers to believe that it regarded "place of contract" as the decisive criterion in balancing the competing interests of the states. However, the Court may well have used the term argumentatively rather than decisively. If read in this light, emphasis was placed on the fact that the place where the misdeed had been committed, must, in the absence of other local factors, be regarded as proving "but slight connection of the forum with the substance of the [insurance] contract obligations,"<sup>99</sup> a contact too insignificant to "localize" the insured interest in the forum.

A few of the localizing statutes seek to underpin the connection of the insurance contract with the forum, by multiplying the localizing factors. For example, North Carolina has brought itself by its localizing statute within the range of two classes, one based on the "place of application," and the other marked by the localization of "property, lives and interests."<sup>100</sup>

<sup>94</sup> See COOK, *op. cit. supra* note 3, at 295.

<sup>95</sup> For Bentham, "interest" was indefinable; for others, it may have a double aspect—on one hand, that of a condition on which our subjective reaction to a certain object depends and, on the other, the object itself. Cf. JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW* 488 n. 4 (1946). See also EDWIN W. PATTERSON, *JURISPRUDENCE* 520 (1953).

<sup>96</sup> 292 U. S. 143 (1934).

<sup>97</sup> ". . . on property, lives or interests in this state." MISS. CODE ANN. tit. 22, §5633 (1942).

<sup>98</sup> 292 U. S. at 150.

<sup>99</sup> *Ibid.*

<sup>100</sup> N. C. GEN. STAT. §58-28 (1943). The subgroups involved are, in the terminology of this article, the first and the fourth.

## V

Naturally, the existence of statutes of the kind discussed above does not, in general, compel a forum to give their theories a preferential position vis-à-vis its own conflict rules. For a few categories, the proper law has been regarded as fixed by the Constitution.<sup>101</sup> Furthermore, the latitude claimed by and accorded a forum in the application of its own law has increased since the *Delta and Pine Land* case. With an increase of regulations by the states and, in the field of social insurance, by the federal government, the last two decades have witnessed, *pari passu*, a changing attitude of the Supreme Court towards the deference with which a forum must regard the law of another state where the connecting factor advanced is "the place of making" or one of the other rigid mechanical concepts discussed above. First, in cases involving Workmen's Compensation laws<sup>102</sup>—so closely connected with insurance<sup>103</sup>—and later in cases affecting other branches of insurance law, the Court has adopted a new approach based entirely on the forum's "substantial governmental interest" in the substance of the insurance transaction, despite the fact that it might, by technical, conceptualistic tests, be classified as an "extrastate contract."

This new trend has manifested itself in both the techniques by which the state exercises control over a foreign insurer: greater administrative control through more extensive regulation of the business activities of the insurer, and extension of the *lex fori* to a multi-state transaction which had its legal inception in a state other than that of the forum. This article is more concerned with the latter than with the former technique. Nevertheless, it was a matter of regulation, not choice of law, that occasioned *Hoopstone Canning Co. v. Cullen*,<sup>104</sup> a case that most emphatically repudiated the older views expressed in *New York Life Ins. Co. v. Head* and *New York Life Ins. Co. v. Dodge*, these two monuments of mechanical territorialism.

The shift in emphasis from conceptualistic mechanical criteria to pragmatic tests derived from social-policy considerations that give weight to the substantial interest of the forum in the risk insured by the contract cannot be denied. The demise of *Head* and *Dodge* is an accomplished fact, the absence of an obituary notwithstanding.<sup>105</sup> Translated into constitutional terms, the new approach amounts to this: In any case, it seems clear that the preference given by the forum to its own law over that of another state does not violate the full-faith-and-credit clause, if only the insurance relationship has substantial contacts with the state of the forum, contacts

<sup>101</sup> See GEORGE W. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 67, 68 (2d ed. 1951).

<sup>102</sup> First, in *Alaska Packers' Ass'n v. Industrial Accident Comm'n of California*, 294 U. S. 532 (1935), and thereafter, in *Pacific Employers' Ins. Co. v. Industrial Accident Comm'n*, 306 U. S. 493 (1939).

<sup>103</sup> Cf. Lenhoff, *Insurance Features of Workmen's Compensation Laws*, 29 CORNELL L. Q. 176, 353 (1943-44).

<sup>104</sup> 318 U. S. 313 (1942). The case involved the application of New York regulations concerning reciprocal insurance associations to an Illinois insurer of this kind who was not qualified to do business in New York but had concluded, carefully evading any conceptualistic connection with New York, about 50,000 contracts insuring New York landowners against fire risks.

<sup>105</sup> These cases lost their vitality and have, in effect, been overruled, says the Comment on *Watson v. Employers' Liability Assurance Corp.*, 348 U. S. 66 (1954), in 35 B. U. L. REV. 452, 460 (1955). See also Mr. Justice Roberts' dissent, last paragraph, in *Osborn v. Ozlin*, 310 U. S. 53, 67, 69 (1940).



by reason of which it would be competent for the forum to regulate the relationship.<sup>106</sup> Nor is the forum under a constitutional duty to enforce the law of another state, if the foreign law is antagonistic to its own strong public policy<sup>107</sup> or if, by its own conflict rules, the law of the forum is applicable. It is only where the insurance contract does not affect any substantial interests of the forum that a case for the extraterritorial due process doctrines would be well founded.<sup>108</sup> Thus, most of the difficulties disappear when it is recognized that the substantial interest doctrine "points up the increasing similarity between fourteenth amendment (due process) and full faith and credit standards for testing the validity of legislation."<sup>109</sup>

Ascertainment of the calculable attitude of the courts is not necessarily a function of uniformity of results. Except for a few insurance types, the very nature of a federated system, each member of which has maintained laws and courts of its own, makes uniformity of results even if there were uniform insurance laws, almost impossible. However, certainty in forecasting results, which, from the functional standpoint, has effects similar to those of uniformity, has been enhanced. In the first place, jurisdictional factors point to domiciliary courts as those in which decisions will be sought. In the second place, the application of the *lex fori*, in view of the present trend towards a full recognition of the power of the forum to give predominance to its own law, will hardly be held to be in excess of constitutional limitations. It is, of course, still true that the Supreme Court functions as the umpire among states interested in the same transaction in determining which state law is to prevail. However, can it still be said that, but for the absence of a formula more specific than that rather general one—a state is not compelled to subordinate its own laws concerning a matter involving its governmental interest—the court has not supplied essential guidance for the assertion of control by the *lex fori*?

## VI

### CONCLUSION

Decisions of the last twenty years not only illustrate the spectacular conflict between the *lex causae* and the *lex fori*, but also highly certain judicial attitudes. To observe only that the Court has shown a tendency to sustain the *lex fori* as the proper law wherever the insurance contract has considerable contact with the forum, would still leave much unsaid. The actual limitations placed upon the scope of the *lex causae* by the *lex loci* should also be noted. Where interests of a resident, even though temporary ones, might be affected by a term or condition of a foreign-controlled insurance contract, the Court has, to an ever-increasing degree, manifested a hands-off policy vis-à-vis the invalidation of such terms by the forum. The Court

<sup>106</sup> E.g., *Pacific Employers' Ins. Co. v. Industrial Accident Comm'n*, 306 U. S. 493 (1939); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U. S. 154, 160 (1945).

<sup>107</sup> E.g., *Griffin v. McCoach*, 313 U. S. 498 (1941).

<sup>108</sup> E.g., *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178 (1936). Cf. *Watson v. Employers' Liability Assurance Corp.*, 348 U. S. 66 (1954) (relying also on the *Delta & Pineland* case, *supra* note 96).

<sup>109</sup> Note, *The Supreme Court 1954 Term*, 69 HARV. L. REV. 119, 140 (1955).

has given the *lex loci* wide scope for the protection of vital local interests, even to the extent of enforcing its provisions at the expense of contractual terms.<sup>110</sup>

*Pink v. A.A.A. Highway Express*<sup>111</sup> is a case in point. There, assessments had been imposed in a proceeding in New York on Georgia policyholders of a New York mutual insurance company which had become insolvent. Clearly, this class of obligations belongs to the narrow class over which the Court has claimed constitutional control with respect to the choice of law, because the subject matter is peculiarly within the regulatory power of the state of incorporation.<sup>112</sup> The Supreme Court, however, sustained the Georgia forum's refusal to enforce the New York assessment decree on the ground that the Georgia law of contracts, under which the defendants had not become members of the company, controlled. In this connection, *Griffin v. McCoach*<sup>113</sup> should also be mentioned. There, the Court reminded that a federal court, in deciding a diversity case, may not enforce an insurance contract contrary to the public policy of the state in which it sits, despite the fact that when tested by all conceptualistic links, such as place of issuance of the policy, delivery of the policy, or payment of premiums and insurance proceeds, the contract is not one of that state.

Finally, there is *Watson v. Employers Liability Assurance*.<sup>114</sup> This case, decided below by a federal district court in Louisiana, concerned the enforcement of a Louisiana "direct action" statute against a foreign insurance company. The liability insurance policy had been negotiated and issued in Massachusetts and delivered in Massachusetts and Illinois to the insured, a Delaware corporation which had its headquarters in Massachusetts. The policy contained a no-action clause which was valid under Massachusetts as well as Illinois law. The only connection that the case had with the forum lay in the fact that the plaintiff, a resident of Louisiana, was injured in Louisiana by using the insured's product, a hair-wave set, which had been bought in Louisiana. Upon these facts, the Supreme Court, reversing the lower courts, allowed the direct action.

It may be significant to observe here that, prior to the *Watson* case, even the domestic courts,<sup>115</sup> including those of Louisiana,<sup>116</sup> in states where a direct-action

<sup>110</sup> See notes 105 and 108 *supra*.

<sup>111</sup> 314 U. S. 201 (1941), *affirming*, 191 Ga. 502, 13 S. W. 2d 337 (1941).

<sup>112</sup> *Broderick v. Rosner*, 294 U. S. 629 (1935). See also Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953).

<sup>113</sup> 313 U. S. 498 (1941).

<sup>114</sup> 348 U. S. 66 (1954).

<sup>115</sup> In the majority of cases, a foreign forum, *i.e.*, one whose law does not include a direct-action statute, has construed a foreign statute of this kind as procedural and declined, for this reason, to apply it. *E.g.*, *Anderson v. State Farm Mutual Automobile Ins. Co.*, 222 Minn. 428, 24 N. W. 2d 836 (1946); *McArthur v. Maryland Casualty Co.*, 184 Miss. 663, 186 So. 305 (1939). *But see* *Burkett v. Globe Indemnity Co.*, 182 Miss. 423, 181 So. 316 (1938). A forum in Michigan, where no such statute exists, declined to apply the direct-action statute of Wisconsin, where the accident had occurred and the insurance contract had had its inception, holding it to be contrary to the strong public policy of the forum. *Lieberthal v. Glen Falls Indemnity Co.*, 316 Mich. 37, 24 N. W. 2d 547 (1946).

<sup>116</sup> In addition to the three decisions cited by Mr. Justice Black in 348 U. S. at 66 n. 6, see also *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d 122 (1950); *Employers' Mutual Liability Ins. Co. v. Eunice Rice Milling Co.*, 198 F. 2d 613 (5th Cir. 1952); *Bayard v. Traders & General Ins. Co.*, 99 F.

statute had been enacted,<sup>117</sup> refused to apply such legislation in situations in which the insurance policy contained a "no action" clause which was valid in the foreign state where the contract was made.<sup>118</sup> Unless the insurance contract was held to be controlled by the law of the forum because of the issuance or the delivery of the policy there,<sup>119</sup> the direct-action rule of the forum was regarded as inapplicable, even where the claimant or the insured party was a resident and the accident had occurred in the state of the forum.<sup>120</sup> Due process notions underlay the reasoning. Thus, the highest court of Wisconsin had, in the leading case of *Ritterbusch v. Sexmith*,<sup>121</sup> characterized the no-action clause "as a substantial contractual right of the company"; obviously, this right postpones the company's obligation until the ascertainment of the insured's liability through judgment or tripartite agreement.<sup>122</sup>

In the light of the foregoing, does the significance of the *Watson* decision lie in a change of the localization of the insurance contract? Did the Supreme Court arrive at the result that the insurance contract must be regarded as a contract controlled by the law of Louisiana, a state entirely unrelated at the time of the issuance of the liability policy to insurer or insured? Such a result would hardly have a basis in legal logic or in decisional reasoning. In the first place, it is obvious that a criterion for determining the proper law of the contract cannot be found in a local relation which did not exist at the time of the consummation of the contract; for the event out of which the liability arises, necessarily follows, in time, the liability insurance contract. In the second place, the main opinion in the *Watson* case does no more than recognize that Louisiana, the locus, is not "compel[led] . . . to subordinate its direct action provisions to Massachusetts contract rules"<sup>123</sup>—and this thesis is strongly underscored in the concurring opinion of Mr. Justice Frankfurter, which emphatically rejects any substantive control over the contract by the *lex loci*. Trying to fit the justifiable demands of the *lex fori* into a contractual pattern worked out by the *lex causae*, the *Watson* opinion followed the *suum-cuique* principle. The

Supp. 343 (W. D. La. 1951), 104 F. Supp. 7 (W. D. La. 1952); *Hidalgo v. Fidelity & Casualty Co.* of N. Y., 104 F. Supp. 230 (W. D. La. 1952). *Contra*: *Buxton v. Midwestern Ins. Co.*, 102 F. Supp. 500 (W. D. La. 1952).

<sup>117</sup> They are: Louisiana (LA. REV. STAT. tit. 22, §655 (Supp. 1950) (based on La. Acts 1950, No. 541)); Rhode Island (R. I. GEN. LAWS c. 155, § 1 (1938)) (based on R. I. GEN. LAWS c. 258, § 7 (1923)); and Wisconsin (Wis. STAT. §85.93 (1953)) (based on a statute of 1931).

<sup>118</sup> *Ritterbusch v. Sexmith*, 256 Wis. 507, 41 N. W. 2d 611 (1950); *Byerly v. Thorpe*, 221 Wis. 28, 265 N. W. 76 (1936); *Riding v. Travelers Ins. Co.*, 48 R. I. 433, 138 Atl. 186 (1927); *Coderre v. Travelers Ins. Co.*, 48 R. I. 152, 136 Atl. 305 (1927). For the attitude of the courts in Louisiana, see note 116 *supra*.

<sup>119</sup> See *Gandall v. Riedel*, 133 F. Supp. 28 (E. D. Wis. 1955); *Oertel v. Williams*, 214 Wis. 68, 251 N. W. 465 (1933).

<sup>120</sup> *Ritterbusch v. Sexmith*, 256 Wis. 507, 41 N. W. 2d 611 (1950); *Riding v. Travelers Ins. Co.*, 48 R. I. 433, 138 Atl. 186 (1927); *Bayard v. Traders & General Ins. Co.*, 99 F. Supp. 343 (W. D. La. 1951), 104 F. Supp. 7 (W. D. La. 1952).

<sup>121</sup> 256 Wis. 507, 41 N. W. 2d 611 (1950). The forum refused to apply its direct-action statute, although the policy had been delivered and the accident had occurred in Wisconsin, because the court regarded the insurance contract as a Massachusetts contract.

<sup>122</sup> That is, a written agreement of the insured, the claimant, and the insurer.

<sup>123</sup> 348 U. S. at 73.

*lex contractus* controls in general, but the *lex loci* may step in to a very limited extent. The limit is set by its "interest in taking care of those injured in the state." Obviously, the formula that there must be a reasonable relation between the legislative action and the protection of the interest applies. Under this aspect, the Court held that Louisiana has the right to subject foreign liability insurance companies to its direct-action law regardless of the no-action clause of the insurance policy. Once this point in reasoning was reached, the conclusion drawn by the Court seemed to be irrefutable. Its proposition is that the local direct-action statute would be applicable under the circumstances presented by the case, even in the absence of another statute which conditions the admission of such companies to the state for the purpose of doing business there upon their consent to direct action.<sup>124</sup>

The result is a sensible one, primarily for three reasons. *First*: Only if regarded from a narrow contractualistic view of the liability insurance relationship can support be found for the reproach that the decision "varies" a term of the insurance policy. Like an employment relationship, the matrimonial tie, or membership in an association, the insurance relationship differs essentially from the ordinary contractual relationship in that it regulates a lasting relationship. The typical contract lacks, on the one hand, compulsory terms; and on the other, it is generally discharged by one single performance. In contrast to it, the foregoing relationships are, to a large extent, subject to minute regulation and sustained over a more or less extended period of time.

A reference to the modern employment relationship may be instructive. The public interest reflected in imperative legislation is spatially limited in effect to the territory of the state. The imperative norms of the *lex fori*, accordingly, will affect the relationship only while the employee works in the state of the forum. Upon his removal to another state, the applicable norms may vary.<sup>125</sup> This also obtains with respect to other relationships of similar character.

The Court reconciled the basic rule of the *lex causae* over the insurance relationship with the claim of the *lex fori*, by means of a process of allocation. It allocated to the latter what seemed to be its due with regard to certain local aspects of the relationship, but left undisturbed the control by the former of the balance. Such a reconciliation of the competing claims of states united in the same federal system has been undertaken by the Court for other relationships as well. As for the matrimonial relationship, the "divisible divorce theory" brings to mind a choice-of-law ruling which similarly rationalizes the allocation to another state of a share in the control over a multi-state relationship by a proper appraisal of its governmental interests therein.<sup>126</sup>

<sup>124</sup> LA. REV. STAT. ANN. tit. 22, §983-E (Supp. 1950) (based on La. Acts 1950, No. 542).

<sup>125</sup> Naturally this does not apply in case an employee is dispatched from his main working place for a merely transitory job to a place in another state. See Lenhoff, *Conflict-of-Laws Problems in Labor Law*, 54 ZENTRALBLATT FÜR DIE JURISTISCHE PRAXIS 769 (1936) (in German); see also 3 RABEL, *op. cit. supra* note 32, at 186.

<sup>126</sup> Cf. *Estin v. Estin*, 334 U. S. 541 (1948). For general treatment of the problem, see Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945).

*Second:* Prior to the *Watson* case, governmental interests of a state have also been recognized as sufficiently important to warrant extension of its administrative regulations to foreign insurers. In this connection, such cases as *Osborn v. Ozlin*<sup>127</sup> and *Holmes v. Springfield Fire and Marine Insurance*<sup>128</sup> might be mentioned in addition to those already discussed. The Court has recognized that more than one state may have a legitimate interest in certain local aspects of an insurance transaction—such as the channeling of the business of insuring local risks into Virginia and Montana, respectively, by requiring that the contracts be made through local agents. Naturally, the legislative power to control administratively the conduct of foreign insurers within the state has not been in issue, but only the extent of the control consistent with contractual freedom. Again, there has been the question of how to reach administratively foreign insurers operating from out-of-state offices;<sup>129</sup> but here, too, no conflict problem is involved, as only the state itself can enforce its own administrative regulations.

By contrast, the merely contractual approach to insurance relationships, the facts of which show existing or potential contacts with more than one state, brings conflict problems into play. Heretofore, a forum intent on sustaining its public policy over that of another state has, more or less, been forced to disguise its refusal to recognize the exclusive legislative power of the latter state over the insurance transaction at issue. The means of disguise have been the use of the public-policy concept<sup>130</sup> or a construction of a foreign statute which “checkmat[es] its application in the case at bar.”<sup>131</sup> Furthermore, the uncertainty about the attitude of the forum may confound predictability.

There can be no doubt that in comparison with other theories in vogue, the newest pragmatic approach of the Supreme Court to the problem should be welcomed. However, it is submitted that it has not formulated a new rationale. The language of the Court is still couched in terms of contract. It is, of course, true that the insurance relationship is founded on a consensual act; but, in substance, its essential features are, directly or indirectly, created by the state. It is an institution rather than a contract in the usual meaning; at best, it is a contract *sui generis*. The regulatory power of the forum is related to the latter's interest in the institution, an interest which may, depending on the kind of insured interest, be determined much

<sup>127</sup> 310 U. S. 53 (1940) (concerning constitutionality of Virginia statute forbidding insurance contracts on persons or property there, except through local agents who should be paid at least one half of commission).

<sup>128</sup> 311 U. S. 606 (1941) (concerning Montana statute of similar import to that in *Osborn v. Ozlin*, *supra* note 127, but requiring payment of full commission to local agent).

<sup>129</sup> *Cf.* *Travelers Health Ass'n v. Virginia*, 339 U. S. 643 (1950); and Note, *Reaching the Out-of-State Mail Order Insurer*, 64 HARV. L. REV. 482 (1951).

<sup>130</sup> For sharp criticism of this concept from the international aspect of the conflict of laws, see Briggs, *The Need for the "Legislative Jurisdictional Principle" in a Policy Centered Conflict of Laws*, 39 MINN. L. REV. 517, 524 (1955).

<sup>131</sup> NUSSEBAUM, *op. cit. supra* note 39, at 38. An excellent illustration of recent date is supplied in *Williamson v. Massachusetts Bonding & Ins. Co.*, 19 Conn. 59, 109 A. 2d 896 (Sup. Ct. 1954), misconstruing N. Y. INS. LAW §167(3) (1949).

more by situs of the property, domicile of the insured, and locus of accident within the forum than by the place of issuance and delivery. If the Court entertained such a rationale, it does not clearly appear.

*Third:* In the matter of insurance, the Supreme Court has found a uniform conflict rule, aside from workmen's compensation situations and ocean-marine insurance transactions, only for claims arising from membership in fraternal benefit associations. In this last area, the Court, led by Mr. Justice Holmes, has continuously pointed to the differences between the membership in an association and an ordinary contractual relationship. The rights and duties of members, the Court has held, are homogeneous and closely connected and must, therefore, be under the uniform rule of the state of the domicile of the association instead of under the diversified control of each and every state wherein a member or his beneficiary resides.<sup>132</sup>

Turning to other areas of insurance law, it appears that once a unifying principle has been discovered and consistently followed, it may achieve, from the standpoint of reliability, almost the same effect as uniformity. Thus, the establishment of the insured's domicile as the forum, where the insurers, in general, are susceptible to service, enhances predictability of results whenever there is a clash between the norms of the *lex fori* and those of another jurisdiction. In the words of an American philosopher, "conclusions from a given theory will be true even when the theory is not absolutely true" because "an approximation of the truth may give us true conclusions within certain limits or in a certain proportion of cases."<sup>133</sup>

<sup>132</sup> *Supreme Council of the Royal Arcanum v. Green*, 237 U. S. 531 (1915); *Modern Woodmen of America v. Mixer*, 267 U. S. 544 (1925); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U. S. 66 (1938); *Order of United Commercial Travelers v. Wolfe*, 331 U. S. 586 (1947); *Young v. Order of United Commercial Travelers*, 142 Neb. 566, 7 N. W. 2d 81 (1942).

Naturally, where counsel do not raise the problem the forum might apply the *lex fori*. Cf. *King v. Order of United Commercial Travelers*, 65 F. Supp. 740 (W. D. So. Car. 1946); such a control by the *lex fori* might also result where counsel have agreed that the relationship is controlled by the *lex fori*. Cf. *Rountree v. Grand Lodge of Ladies Auxiliary*, 236 Mo. App. 378, 156 S. W. 2d 784 (1941).

<sup>133</sup> COHEN, *op. cit. supra* note 49, at 118.