

# VALIDITY AND EFFECTS OF CONTRACTS IN THE CONFLICT OF LAWS\*

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## III

### LAW GOVERNING MEETING OF MINDS

A question may arise whether there was in legal contemplation a meeting of minds. Suppose that A in New York makes an offer to B in Germany by mail, and that he revokes it by cable after B has received the letter containing the offer. Under the German law A is bound by his offer if it is accepted within the period within which A would under ordinary circumstances expect an answer.<sup>56</sup> If the transmission of a letter between New York and Germany takes two weeks B could accept the offer by cable at any time before the expiration of the two weeks after the receipt of the offer. Under the law of New York A is not bound by his offer and can withdraw it at any time before it is accepted. If B accepts the offer within the period mentioned, has a contract been formed? It has been said that the offeror is deemed present in the state in which his offer has been received, and the conclusion has been drawn that A's duty to keep his offer open should be governed in the above case by German law.<sup>57</sup> Such a deduction involves, however, a process of reasoning that starts from a false premise. If the law of the forum regards the contract as made in the state from which the acceptance is sent, in our case, Germany, the consequences will be the same, of course, as if A had made the offer in person in Germany. But the preliminary question, *where* the contract was made, is actually decided by the law of the forum without reference to the German law. If the German law had been consulted the contract would have been made in New York.<sup>58</sup> For the same reason the law of the forum must determine, in accordance with its own views, the preliminary question regarding the binding nature of an offer. There is no more reason why the court should consult German law on this point than there was in determining the situs of the contract. These preliminary questions

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\* Continued from 30 YALE LAW JOURNAL, 565, 655.

<sup>56</sup> German Civil Code, Sec. 147.

<sup>57</sup> Hibbert, *International Private Law* (1918) 130; Cohen, *Des Contrats par Correspondance en Droit Français en Droit Anglais et en Droit Anglo-Américain* (1921) 178.

<sup>58</sup> According to German law the contract is not deemed made until the letter of acceptance reaches the offeror. I Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, (7th & 8th eds. 1912) 567.

must in the nature of things be determined by each court in accordance with its own law,<sup>59</sup> except perhaps where a contract is concluded between two foreign states or nations whose laws agree on the subject.<sup>60</sup> The other possible alternative, that of requiring compliance with the law of both states under all circumstances, does not commend itself because it restricts too greatly the formation of contracts from an international point of view.

## IV

## LAW GOVERNING THE EFFECTS OF CONTRACTS

If the validity of the contract and of its provisions is admitted and the question relates to the rights, duties, etc., arising out of such a contract, i. e. its effects, there can be no doubt that the intention of the parties is the controlling factor. The parties are perfectly free to agree upon the nature of the contract, its effect, its performance, and the consequences resulting from non-performance, so far as dispositive provisions of law are concerned, that is, provisions in regard to which the parties have full freedom to contract. If the parties have clearly expressed themselves on the subject, the matter is free from difficulty, and is simply one of interpretation or proof. Where the parties have defined their rights, duties, etc., however, by reference to some particular foreign law, a question may arise whether they should be allowed absolute freedom in the selection of such law, or whether they should be limited in their choice to the law of the countries that have an actual connection with the contract.<sup>61</sup>

If the parties have not expressed themselves regarding the law that shall determine the extent of their rights, duties, etc., their intention may appear from the terms of the contract in the light of surrounding circumstances. However expressed, the actual will of the parties controls.<sup>62</sup>

What is to be done, however, in the ordinary case where it is apparent that the parties did not think at all about the legal effect of their contract? In such cases the law may take one of two courses. It may content itself with adopting the general rule that the law of the state with which the contract has the closest connection shall control,<sup>63</sup> or it may lay down more specific rules. The method which leaves the ques-

<sup>59</sup> Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247-282.

<sup>60</sup> *Id.*, 281.

<sup>61</sup> As the parties must prove the foreign law, there would appear to be no good reason why they should be restricted in their choice. Bustamante, *La Autarquia Personal* (1914) 110; 1 Rolin, *Principes de Droit International Privé* (1897) 437; 4 Weiss, *Traité de Droit International Privé* (2d ed. 1912) 354.

<sup>62</sup> Dicey, *Conflict of Laws* (2d ed. 1908) 529, 556.

<sup>63</sup> This appears to be essentially the practice of the English courts. Westlake stated before the Institute of International Law that the English judges could not be tied down by any presumption. (1904) 20 ANNUAIRE, 169.

tion to the courts as a question of fact has the seeming advantage that it permits the working out of justice in each particular case, but its great weakness is that the parties cannot know before the decision of the question by the courts what their rights under the contract are. As the conclusion of the court will depend upon an appreciation of all the surrounding circumstances, it is impossible to anticipate with any degree of certainty the decision of a case. As an escape from this situation, courts and legislatures have adopted subordinate rules of law or presumptions. Courts and writers taking this view are agreed that the law so chosen should be the law which the parties as reasonable men probably would have intended to apply had their attention been directed to the matter.<sup>64</sup> But when it comes to the selection of the rule or rules there is the greatest difference of opinion.

#### A. PRESUMPTION IN FAVOR OF THE PERSONAL LAW

(1) *Common National Law.* Many of the Italian and French writers are of the opinion that, where the parties have the same nationality and do not express their intention regarding the law that shall control their rights, they tacitly contract with reference to their common national law.<sup>65</sup> They hold, therefore, that, whenever the facts of a case do not point to a different conclusion, a presumption should exist in favor of their *lex patriae*. These writers reach different conclusions, however, concerning the presumption to be adopted if the parties do not possess the same nationality. Some hold that the parties must have contracted in such a situation with a view to the *lex loci*.<sup>66</sup> Others are of the opinion that if the parties have the same domicile it is more reasonable to assume that they contracted with reference to that law, especially where it has been established a long time.<sup>67</sup> Still others make a distinction between bilateral and unilateral contracts, and submit the former to the *lex loci* and the latter to the personal law of the debtor.<sup>68</sup> Where the parties have no common nationality and no common domicile, but one of the contracting parties has a domicile in the country to which the other belongs, some writers believe that the law of the latter state

<sup>64</sup> Pillet, *Principes de Droit International Privé* (1903) 440.

<sup>65</sup> Durand, *Essai de Droit International Privé* (1884) 420; Despagnet, *Précis de Droit International Privé* (5th ed. 1909) 881-882; Jarassé, *Essai sur la Substance et les Effets des Conventions en Droit International Privé* (1886) 58; 2 Laurent, *Le Droit Civil International* (1881) 413-414; Surville et Arthuys, *Cours Élémentaire de Droit International Privé* (6th ed. 1915) 298-299. Meili would apply the common national law with the proviso that the parties at the time of contracting were aware of their common nationality. 2 Meili, *Das Internationale Civil und Handelsrecht* (1902) 16.

<sup>66</sup> Bard, *Précis de Droit International Pénal et Privé* (1883) 266; Despagnet, *op. cit.*, 882; Durand, *op. cit.*, 420; 2 Laurent, *op. cit.*, 414-416.

<sup>67</sup> Jarassé, *op. cit.*, 58; Surville et Arthuys, *op. cit.*, 302; 3 Weiss, *op. cit.*, 356.

<sup>68</sup> 1 Foelix, *Traité de Droit International Privé* (4th ed. 1866) 159, 227; 1 Fiore, *Le Droit International Privé* (Antoine's transl. 1907) 157. *Contra*: Demangeat sur Foelix, 230, note b; Despagnet, *op. cit.*, 885-886; Dreyfus, *L'Acte Juridique dans le Droit International Privé* (1904) 303.

expresses the probable intention of the parties.<sup>69</sup> If the case does not fall within any of the above classes, some writers prefer the law of the place of performance to the law of the place of contracting, where the contract had merely a casual connection with the *lex loci contractus*.<sup>70</sup>

(2) *Common Domiciliary Law*. Some writers contend that the application of the *lex patriae* does not rest upon a reasonable basis. They urge that contracts have nothing to do with national characteristics or traditions, but belong exclusively to the economic life of an individual, which centers about his domicile. Where the parties have not expressed their intention it is reasonable to assume, therefore, according to these writers, that they would have chosen the law of their common domicile as the law governing their legal relations.<sup>71</sup> Some writers prefer the law of the common nationality if the common domicile was not long established.<sup>72</sup> In the absence of a common domicile some prefer the *lex loci*,<sup>73</sup> while others raise a presumption in favor of the *lex patriae* if the contracting parties have the same nationality, and support the *lex loci* only if the parties have no common domicile or nationality.<sup>74</sup> Where the *lex loci contractus* has only an accidental connection with the contract, some of the above writers would determine the rights of the parties with reference to the law of the place of performance.<sup>75</sup>

(3) *Bustamante's View*: Bustamante is of the opinion that an unqualified preference should be given neither to the law of the common nationality nor to that of the common domicile. Where the parties have the same nationality and the same domicile and the contract is made in one of these states, Bustamante thinks that the parties must be deemed to have contracted with reference to that law.<sup>76</sup> In the same way, where they have the same nationality, but different domiciles, or the same domicile but different nationalities, and the *locus contractus* is in the country that is common to the parties, the presumption should be in favor of such state.<sup>77</sup> Where the parties have the same nationality and the same domicile and the contract is made in neither state nor country, Bustamante would choose the personal law in accordance with his view con-

<sup>69</sup> Surville et Arthuys, *op. cit.*, 302.

<sup>70</sup> *Id.*, 302.

<sup>71</sup> Asser, *Éléments de Droit International Privé* (Rivier's transl. 1884) 75; Chausse (1897) 24 CLUNET, 1, 26; Jarassé, *op. cit.*, 58; Pillet, *Cours de Droit International Privé* (1905) 325; *Principes*, 441; (1908) 22 ANNUAIRE, 80; I Rolin, *op. cit.*, 470-471, 511-514; Valery, *Manuel de Droit International Privé* (1914) 985. In the absence of a common domicile some prefer the *lex loci*. Asser, *op. cit.*, 73, 75; Pillet, *Cours*, 327. Others, the common national law. I Rolin, *op. cit.*, 470.

<sup>72</sup> Audinet, *Principes Élémentaires du Droit International Privé* (2d ed. 1906) 283; Bossion, *Du Conflict des Lois en ce qui Concerne la Substance des Obligations Conventionnelles* (1884) 188; Verdía, *Tratado Elemental de Derecho Internacional Privado* (1908) 177-178; 4 Weiss, *op. cit.*, 355-356.

<sup>73</sup> Pillet, *Cours*, 327; *Principes* 441; (1904) 20 ANNUAIRE, 157.

<sup>74</sup> Jarassé, *op. cit.*, 58; I Rolin, *op. cit.*, 470.

<sup>75</sup> Pillet (1904) 20 ANNUAIRE, 157.

<sup>76</sup> Bustamante, *op. cit.*, 142.

<sup>77</sup> *Id.*, 143.

cerning laws of internal public order which are personal as regards their object.<sup>78</sup> If the parties have neither a common nationality nor a common domicile, Bustamante favors the application of the *lex loci*.<sup>79</sup>

(4) *Law of Debtor's Domicil*: A good many writers contend that if the parties have not entered into an express stipulation as to the governing law, and their actual intention does not appear from the facts of the case, they must be deemed to have contracted with a view to the law of the debtor's domicile.<sup>80</sup> In justification of this presumption, Bar alleges the following:<sup>81</sup>

"In so far, however, as there is a question of the interpretation to be put on the intention of the parties, we must unquestionably proceed upon the footing, that every person expresses himself in accordance with the law and the statutes which he knows, and has recourse therefore to the law to which he is personally attached. This rule of interpretation is applied in cases of unilateral obligations or transactions, especially in *mortis causa* settlements, even by those who propose to construe contract obligations by the *lex loci contractus*, or by the law which prevails at the place of performance.

Lastly, the view we have here maintained is supported by the fact that in very many cases, and in particular where no other place of performance is specially stipulated, the domicile of the debtor is the place of performance, and that in by far the greater number of cases, action to compel performance of a personal obligation, with a view to the possibility of ultimate execution, is brought at the domicile of the debtor."

#### B. LAW OF THE PLACE OF PERFORMANCE

In this country and in Germany most courts and many writers, following Story and Savigny,<sup>82</sup> hold that, where there is no proof of an actual intention, the parties must be deemed to have contracted with reference to the law of the place of performance. This conclusion is based by Savigny upon the theory that the parties, as reasonable men, if they had thought of the matter, would have naturally chosen the law of the place with which the contract had the most vital connection, and this is deemed to be the law of the place of performance, because the whole expectation of the parties is regarded as being directed to the performance of the contract.<sup>83</sup>

<sup>78</sup> *Id.*, 142-143.

<sup>79</sup> *Id.*, 144.

<sup>80</sup> Bar, *Private International law* (Gillespie's transl. 1892) 544; 1 Crome, *op. cit.*, 148 and note 44; Harburger (1902) 19 ANNUAIRE, 141; Klöppel (1890) ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT UND STRAFRECHT, 197; Neumann, *Internationales Privatrecht* (1896) 89; Reglesberger, *Pandekten* (1893) 174; 1 Stobbe, *Deutsches Privatrecht* (3d ed. 1893) 261; Windscheid, *Pandekten* (9th ed. 1906) 146.

<sup>81</sup> Bar, *op. cit.*, 544.

<sup>82</sup> See *supra*, 30 YALE LAW JOURNAL, 574, 577.

<sup>83</sup> Accord: Algara, *Lecciones de Derecho Internacional Privado* (1899) 187; Barazetti, *Das Internationale Privatrecht im Bürgerlichen Gesetzbuche für das*

## C. LAW OF THE PLACE OF CONTRACTING

Some of the English courts hold that the law of the country where a contract is made governs its effects in the absence of anything to show a contrary intention.<sup>84</sup> This presumption applies with special force where the contract is made in England. Where the contract is made in one country and is to be performed either wholly or partially in another, great weight is given to the law of the place of performance, especially as to the mode of performance.<sup>85</sup> A few states in this country also apply the law of the place of contracting.<sup>86</sup>

So far as the *lex loci* is followed on the continent, it is usually given a subordinate place, and is invoked only in the absence of a common nationality or a common domicile,<sup>87</sup> refuge being generally taken to the law of the place of contracting only as a means of last resort. This tendency is particularly noticeable in contracts by correspondence. In this class of cases the *lex loci* is often ignored altogether, its place being taken either by the law of the state from which the offer was dispatched,<sup>88</sup> by the law of the domicile of the offeror,<sup>89</sup> or of the party who took the preponderating part in the negotiations,<sup>90</sup> or by the law

*Deutsche Reich* (1897) 55; Boyens (1898) 4 VERHANDLUNGEN DES 24 DEUTSCHEN JURISTENTAGES 112 ff.; Carrio, *Apuntes de Derecho Internacional Privado* (1911) 187 ff.; I Dernburg, *Das Bürgerliche Recht* (3d ed. 1906) III; Enneccerus, (1898) 4 VERHANDLUNGEN DES 24 DEUTSCHEN JURISTENTAGES 85, 119; Gerber, *System des Deutschen Privatrechts* (17th ed. 1895) 41; Gierke, *Deutsches Privatrecht* (1895) 231-232; Krohn, *Die Vertragsobligationen in Materieller Beziehung nach Deutschen Internationalen Privatrecht* (1909) 92.

<sup>84</sup> *Jacobs v. Crédit Lyonnais* (1884, C. A.) L. R. 12 Q. B. Div. 589. Contracts of affreightment are presumed to be entered into with reference to the law of the flag. *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115.

<sup>85</sup> *Chatenay v. Brazilian Submarine Co.* [1891, C. A.] 1 Q. B. 79; *Hamlyn v. Talisker Distillery* [1894, H. L.] A. C. 202; Dicey, *op. cit.*, 565-566.

<sup>86</sup> Beale, *What Law Governs the Validity of a Contract* II (1910) 23 HARV. L. REV. 194, 207.

<sup>87</sup> See *supra*, 30 YALE LAW JOURNAL, 567-570. This is especially true of the French and Italian writers. Compare, I Förster-Eccius, *Preussisches Privatrecht* (7th ed. 1896) 62; Niemeyer, *op. cit.*, (1895) 241; (1899) 3 DEUTSCHE JURISTENZEITUNG 373; Schäffner, *Entwicklung des Internationalen Privatrechts* (1841) 108-109; Vareilles-Sommières, *La Synthèse du Droit International Privé* (1897) 228.

<sup>88</sup> Japan, Art. 9, Law concerning the Application of Laws in General; De Becker, *International Private Law of Japan* (1919) 98. If, however, the recipient of the offer was ignorant, at the time of his acceptance, of the place from which the offer had been despatched, the place of the offeror's domicile is regarded as the place of the act. *Ibid.*

<sup>89</sup> Cass. Turin, Jan. 13, 1891, (1891) 18 CLUNET, 1026. Institute of International Law (1908) 22 ANNUAIRE, 291. Where the original offer is modified in the course of the negotiations, the law of the domicile of the party making the last offer governs. Neumann, *op. cit.*, 6, sec. 15, 86.

<sup>90</sup> Surville (1891) 18 CLUNET, 371.

of the state which would postpone the formation of the contract longest,<sup>91</sup> or by some other law.<sup>92</sup>

The above rules are laid down generally as *prima facie* presumptions or as mere guides for the courts, in the absence of an express agreement regarding the governing law or of circumstances from which a contrary intention may be inferred. Whenever the parties have chosen a particular law, or the court is satisfied that if they had thought of the matter, they would probably have contracted, as reasonable men, with reference to some other law than that pointed out by the *prima facie* presumption, such law will control. In this country there is a tendency to regard the *lex loci contractus* and the *lex loci solutionis* as fixed rules of law, for in the great majority of cases the courts do not inquire into the attendant circumstances.

The practical advantages and disadvantages of the presumptions above mentioned have been indicated in the main in the discussion of the intrinsic validity of contracts. So far as this country is concerned, only three of the above rules are entitled to serious consideration, viz. the law of the common domicil of the parties, the law of the place of performance, and the law of the place of execution. The adoption of the law of the common nationality of the parties would be absolutely impracticable. Even in continental countries in which the principle of nationality has been accepted in the conflict of laws, it is realized that its application to the law of contracts is unwarranted in view of the fact that contracts affect the economic life of a person, which has little if anything to do with nationality. The *lex domicilii* of the debtor also, suggested by Bar, is unacceptable, for there would appear to be no reason why the law of the debtor's domicil should be preferred to that of the creditor. Of the remaining rules, the law of the common domicil of the parties has no support in this country, although a good deal might be said in its favor, except for the special conditions prevailing here. On the continent the domicil of the party is the center of his affairs.<sup>93</sup> With us it is a person's home and very frequently the home is in a different state from a person's place of business. With us a person has, not infrequently, residences in different states, or he may have a residence in one state and his domicil in another, the result being that the determination of the domicil of the parties is often a

<sup>91</sup> Bartin (1897) 24 CLUNET, 476; Chrétien (1891) 18 CLUNET, 1028; Dreyfus, *op. cit.*, 363.

<sup>92</sup> For example, according to Ferron, the law of the place to which the offer is addressed should be applied as the law of the place where the offer is in fact made. The author contends that making an offer by mail is the same as if the offeror were physically present in the state to which the letter is sent. (1901) 50 REVUE CRITIQUE, 429-430. A. Cohen, the latest writer on the subject, concludes that it is impossible to choose a definite law and that the governing law should be the one which the parties would probably have preferred in the light of all the attendant circumstances. *Des Contrats par Correspondence en Droit Français, en Droit Anglais et en Droit Anglo-Américain* (1921) 178.

<sup>93</sup> See Lorenzen, *op. cit.*, 20 COL. L. REV. 248.

matter of great difficulty. Because of these practical considerations our courts have rejected the *lex domicilii* even as regards capacity to contract, with respect to which it has been the traditional rule on the continent for centuries.<sup>94</sup>

In this country opinion has been divided between the law of the place of performance and that of the place where the contract was executed, the majority of the courts supporting the former rule. Where the place of performance is agreed upon or appears with certainty from the contract, the adoption of the *lex loci solutionis* furnishes a simple and certain rule.<sup>95</sup> It loses these characteristics, however, when the place of performance is not indicated and has to be inferred from attendant circumstances<sup>96</sup> or to be derived from particular rules of law.<sup>97</sup> With respect to bilateral contracts, in which each party has agreed to perform in a different state, the *lex loci solutionis* cannot be consistently applied at all, for it would logically require that the duties of each party be subject to the law of the place in which he agreed to perform, and thus cause essentially dependent promises to be subject to different laws. Our courts do not seem to have faced this problem, which becomes most acute in the law of sales, and have avoided it in this class of cases by abandoning the *lex loci solutionis* for the law of the place where the title of the chattel passes.<sup>98</sup> An application of the law of the place of performance of each party to a bilateral contract may lead to discrepant results. For example, the law of the buyer's place of performance may throw the risk of the subject matter sold on the buyer, while the law of the seller's place of performance may throw it on the seller. Again, one party may be entitled to demand performance by virtue of the law of the place of performance of the other contracting party, while he may not be bound at all according to the law of his place of performance. The German courts and writers have made the most strenuous efforts to extricate themselves from this embarrassing situation. Bar, who argues this question from the standpoint of the law of the debtor's domicil, makes the following observations in regard to the question of risk:<sup>99</sup>

<sup>94</sup>To-day the law of nationality has been commonly substituted for that of domicil.

<sup>95</sup>Mitteis, 4 VERHANDLUNGEN DES 24 JURISTENTAGES, 103; Pillet, (1904) 20 ANNUAIRE, 154; Valery, *op. cit.*, 981. According to Story also, if no place of performance is indicated, or the contract may indifferently be performed anywhere, the contract ought to be referred to the *lex loci contractus*. Story, *Conflict of Laws* (8th ed. 1883) 381.

<sup>96</sup>Concerning the ascertainment of the *lex loci solutionis*, see Minor, *Conflict of Laws* (1901) 377, 378; Story, *op. cit.*, 381-383.

<sup>97</sup>See, for example, German Civil Code, sec. 269. The "place of performance" is a difficult and complicated legal term. Niemeyer, *Vorschläge und Materialien* (1895) 241; (1898) 3 DEUTSCHE JURISTENZEITUNG, 373; 2 Zitelmann, *Internationales Privatrecht* (1912) 372.

<sup>98</sup>*Ladd v. Dulany* (1809, C. C. D. C.) 1 Cranch, C. C. 583; *Kline v. Baker* (1868) 99 Mass. 253; *Jaffray v. Wolf* (1895) 4 Okl. 303, 47 Pac. 496; *McIlvaine v. Legaré* (1884) 36 La. Ann. 359.

<sup>99</sup>Bar, *op. cit.*, 546.



"We have, however, precisely the same difficulty if two express provisions at variance with each other find their way into a contract, and no interpretation sought from other circumstances avails to give exclusive validity to the one or to the other. The decision must be in favor of the defender, since the pursuer has certainly not made out his case."

Windscheid also, who, like Bar, accepts the *lex domicilii* of the debtor in lieu of the law of the place of performance, would apparently reach the same result by granting to the debtor in all cases an option to rely either upon his own law or upon that of the creditor. He says:<sup>1</sup>

"As, however, the creditor is the person who is the claimant, he must, in order that he may recover anything, accept the law of the debtor's domicil, if he, the debtor, insists upon the application of this law; but conversely the law of his, the creditor's own domicil, may have to be taken, if it suits the debtor to appeal to it."

Speaking of the case where one party is entitled to demand performance by virtue of the law of the place of performance of the other contracting party when he is not bound at all by the law of his own place of performance, Bar says:<sup>2</sup>

"But in every contract the undertaking of the one party depends upon that of the other; the one has only validly bound himself in so far as the other is bound to carry out his undertaking. He can, therefore, if he is called upon to do his part, demand that the other party shall either do his first (if this is sufficient, as it often is, to bar any subsequent challenge of the transaction), or bind himself in some way that is recognized by the law of his domicil. If, however, the party who is truly bound has already performed his part, and if, by the law of the domicil of the other party, it is not enough for the validity of the contract that the performance so made has been accepted, then all that is left is an action to recover what has passed. (*Conditio indebiti sine causa* in Roman law.) Most cases, however, will not turn upon this question, but upon whether the party who has already done, or alleges that he has done, his part, shall be satisfied with the *minus*, which is all that the law of the other party allows him."

Other writers attempt to get out of the predicament by applying the law of the party whose performance plays the more important role in the particular class of cases.<sup>3</sup> In the matter of sales the law of the seller has been preferred on that ground.<sup>4</sup> Zitelmann would apply the national law of both parties whenever the fact in question concerns both alike.<sup>5</sup> Others, realizing that all of the above solutions are mere expedients which prove the unfitness of the *lex loci solutionis* with respect to bilateral contracts, abandon it in this class of cases in favor of the *lex loci*.<sup>6</sup>

<sup>1</sup> Windscheid, *Pandekten* (9th ed. 1906) 146.

<sup>2</sup> Bar, *op. cit.*, 546.

<sup>3</sup> Enneccerus (1898) 4 VERHANDLUNGEN DES 24 DEUTSCHEN JURISTENTAGES, 90; Krohn, *op. cit.*, 94. See also Bar (1902) 19 ANNUAIRE, 142-143.

<sup>4</sup> Harburger (1902) 19 ANNUAIRE, 142-143.

<sup>5</sup> Zitelmann, *op. cit.*, 411.

<sup>6</sup> Neumann, *op. cit.*, 91.

The law of the place of performance is equally unavailable in two other classes of cases. One of these is where an indivisible contract is to be performed in different states.<sup>7</sup> The second class of cases relates to contracts which are to be performed in one of several places at the option of the promisor. The law of the place of performance cannot govern in such a case if the promisor fails to perform in either place.

The *lex loci* also, as has been shown above,<sup>8</sup> is not free from objections. It has been criticized especially with respect to contracts by correspondence, a class of contracts which is very important from the standpoint of the conflict of laws. As a matter of legal theory it is without question objectionable to have the rights of parties determined by the law of a particular state simply because the last act to make it a binding contract occurred in that state. If A, a business man in Connecticut, makes an offer to B in New York City, B being a resident of New Jersey, and B forgets to mail the letter of acceptance until he is in New Jersey, it would seem as if the contract should be governed either by the law of New York or by that of Connecticut, but the logical application of the *lex loci* requires in this country that the law of New Jersey govern the rights of the parties. The following substitutes for the *lex loci* have been suggested, among others, in this class of cases: (1) the law of the domicile of the offeror; (2) the law of the place where the offer was made, if such place appeared from the letter or was otherwise known; (3) the law of the party controlling the negotiations; (4) the law of the state which postpones the formation of the contract longest.<sup>9</sup>

A new method for the solution of the problem before us has been proposed by A. Rolin<sup>10</sup> and approved by the Institute of International Law at its session in Florence in 1908. Instead of finding the point of contract exclusively either in the personal law of the parties, in the *lex loci contractus*, or in the *lex loci solutionis*, it is derived from the nature of the contract, the relative condition of the parties, and the situs of the property. The conclusions reached by the Institute are embodied in the following resolutions:<sup>11</sup>

Art. 1. The effect of contractual obligations is determined by the law to which the parties have manifested their intention to submit themselves, in so far as the validity of the obligation and its effects are not opposed to the laws which control the contract absolutely, particularly as regards personal capacity, formalities, intrinsic validity, or public policy.

Art. 2. If the parties have not expressed a real intention to accept

<sup>7</sup> Where the contract is divisible, it may be regarded as a separate contract with reference to each state, so that the law of the place of performance could be applied. Minor, *op. cit.*, 380.

<sup>8</sup> *Supra* 30 YALE LAW JOURNAL, 663.

<sup>9</sup> *Supra* note 91, at p. 58.

<sup>10</sup> (1908) 22 ANNUAIRE, 86-89.

<sup>11</sup> *Id.*, 289-292. Art. 2, subdiv. e-h, and i, and Art. 4 have been somewhat condensed.

a certain law as a supplementary law, that is to say, as a law intended to fill the gaps in their contracts, to the extent that they are free to determine such effects, the determination of the law to be applied as a supplementary law shall be derived from the nature of the contract, from the relative condition of the parties, or from the situs of the property.

Thus there will be applied:

(a) With respect to contracts made at an exchange, at fairs or at public markets, the law of the place of contracting.

(b) With respect to contracts affecting immovables, the law of the situs of the immovables.

(c) With respect to gratuitous contracts, the law of the domicile of him who confers the gratuity or renders the gratuitous service (gift, loan without interest, gratuitous agency or bailment, suretyship, etc.).

(d) With respect to commercial sales made between a merchant and a non-merchant, or between a merchant and another merchant, provided it does not constitute a commercial act on the part of the buyer, and excepting the case provided for under (a), the law of the place in which the commercial establishment of the seller is located.

(e) With respect to contracts for service, labor, public works, or supplies for a state, province, county or a public institution, the law of such state, province, etc.

(f) With respect to contracts of insurance, the law of the seat of the company.

(g) With respect to contracts entered into with a person exercising a profession regulated by law (physicians, lawyers, etc.), and which relate to such profession, the law of the place where such profession is exercised.

(h) With respect to contracts of service entered into between laborers or employees and a corporation, partnership, or merchant, the law of the seat of such corporation, partnership, or commercial establishment.

(i) With respect to bills and notes, the law of the place where each contract is entered into, or, if such place be not mentioned in the instrument, that of the domicile of the obligor.

(j) With respect to contracts of carriers, forwarders, etc., the law of the principal establishment.

Art. 3. If the determination of the applicatory law, when the parties are silent, can not be derived from the nature of the contract, nor from the relative condition of the parties nor from the situs of the property, the judge will take into account the law of their common domicile; in default of a common domicile, their common national law; and if they have neither a common domicile nor a common nationality, the law of the place of contracting.

Art. 4. If the contract has been concluded by correspondence, the *lex loci contractus* shall not be taken into consideration and the law of the domicile of the commercial establishment of the offeror shall be applied.

The same law shall apply where the contract is concluded by telephone. If the question from whom the offer proceeds can not be determined, the law of the common domicile, of common nationality, or subsidiarily, that of the domicile of the debtor shall be applied.

Art. 5. With respect to the mode of execution, counting, weighing and measuring, to default, holidays, and the validity of payment, tender and deposit, the law and the usages of the place of performance shall be applied.

Art. 6. When the effect of the contract depends upon the sense of certain terms used to designate the price, the weight, the measure, the period and time of payment, reference shall be had in general to the terminology of the place of performance, unless it appears from the circumstances, and especially from the object of the contract, that the parties actually used them in a different sense.

Art. 7. Notwithstanding the above presumptions a manifestation of the real will of the contracting parties, even though it be tacit, shall prevail.

If a uniform law were to be drawn up for the United States, the method followed by the Institute might be found practicable and advantageous. Some of the conclusions reached would require modification in view of the conditions prevailing in this country, but the principle that the subsidiary rule should have reference to the nature of the contract, to the situation of the parties, and to the situs of the property, would appear to be theoretically sound. There is doubt, however, whether a classification of legal transactions along the lines suggested is practicable in a country like ours, where the business organization has assumed to a very large extent an interstate character. However this may be, the method is clearly not a judicial one. It requires a survey of the whole field of contracts and the mode in which the business is conducted, and this cannot be done in a judicial proceeding.

The problem before our courts is therefore the following: Shall one or more *prima facie* presumptions be adopted, which are to be displaced whenever the courts are satisfied that the parties would probably have contracted with reference to another law had they been aware of the question, or shall they adopt one or more subsidiary rules of law which shall control in the absence of evidence showing an *actual* intention of the parties to contract with reference to some other law? The writer is satisfied that the second method is the preferable one. The strongest argument in favor of the first method is that it will correspond more nearly with the presumed intention of the parties. It is submitted, however, that it does not so operate in actual practice. The writer has examined the decisions of the English, French, and German courts and has found that in the great majority of cases when the contract was connected at all with the state in which the court sat, the parties were deemed to have contracted with reference to the law of the forum. In arriving at this conclusion the courts often attributed decisive importance to facts which there is every reason to believe would not have been controlling in the minds of the parties. The uncertainty to which this mode of solving the problem gives rise, preventing the parties as it does from knowing their rights before a judicial determination of the question, makes it advisable that a definite rule be adopted which shall control where the *actual* intention of the parties cannot be ascertained.<sup>12</sup> The nature of such a rule will vary in the nature of

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<sup>12</sup> 3 Catellani, *Il Diritto Internazionale Privato e suoi Recenti Progressi* (1888) 577.

things with respect to the different classes of contracts. As regards contracts of affreightment, for example, it might be the law of the flag.<sup>13</sup> With respect to ordinary contracts the *lex loci contractus* and the *lex loci solutionis* contend for preference, the advantages and disadvantages of which have been set forth above. The writer is of the opinion that a compromise between the two will afford perhaps the best solution possible of the problem. He would suggest, therefore, that the effects of contracts be determined by the law of the place of performance if a place of performance is specified, and by the law of the place of contracting if a place of performance is not specified.

There is a final question of a general character which requires an answer. It is this: Are all the effects of a contract to be governed by the same law, or may they be subject to different laws? As to the mode of performance, courts and writers are agreed that it is good policy to allow business to be carried on in the usual mode unless the parties have stipulated to the contrary.<sup>14</sup> It would be inconvenient if, for example, the details of presentment, protest, and notice had to comply with the local law governing each contract on a bill or note.<sup>15</sup> A bank may have thousands of such instruments falling due on the same day, and it would be awkward, to say the least, if the law of the foreign countries in which the instruments were drawn or indorsed had to be satisfied in the above respects. For similar reasons it is held that the mode of delivery, the mode of payment,<sup>16</sup> and other similar incidents of performance should be controlled by the law of the place of performance.

Most courts and authors hold also that, when the effect of a contract depends upon the meaning of certain terms used to designate the weight, the measure, or the period and time of payment, reference should be had to the terminology of the place where the performance is to take place, unless it appears from the circumstances that the parties actually used them in a different sense.<sup>17</sup> If a bill of exchange is drawn on Mexico for a sum expressed in dollars, it is convenient to hold that the instrument calls for Mexican dollars.<sup>18</sup> If a bill is drawn on a country

<sup>13</sup> *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115.

<sup>14</sup> Dicey, *op. cit.*, 563; Foote, *Private International Jurisprudence* (4th ed. 1914) 424; Bard, *op. cit.*, 269; Diena, *Principi* (1910) 245; Meili, *op. cit.*, 525; 2 *id.*, 543; Valery, *op. cit.*, 993; 4 Weiss, *op. cit.*, 389.

<sup>15</sup> See Lorenzen, *Conflict of Laws Relating to Bills and Notes* (1919) 150-155.

<sup>16</sup> Dicey, *op. cit.*, 566; Foote, *op. cit.*, 425; Asser, *op. cit.*, 74-75; Bard, *op. cit.*, 269; 3 Catellani, *op. cit.*, 568; Despagnet, *op. cit.*, 916-918; Champcommunal (1896) 45 REVUE CRITIQUE, 590; Esperson (1882) 9 CLUNET, 273; Jettel, *Handbuch des Internationalen Privat- und Strafrechts* (1893) 108; Meili, *op. cit.*, (Kuhn's transl. 1905), 326; Pillet (1896) 23 CLUNET, 15; Renault, (1884) 33 REVUE CRITIQUE, 717; Surville et Arthuys, *op. cit.*, 336; 4 Weiss, *op. cit.*, 389. *Contra*: Audinet, *op. cit.*, 301; Dreyfus, *op. cit.*, 370; cf. 2 Rolin, *op. cit.*, 543-544.

<sup>17</sup> 2 Rolin, *op. cit.*, 548.

<sup>18</sup> Bar, *op. cit.*, 674; Esperson, *Diritto Cambiario Internazionale* (1870) 97; 1 Fiore, *op. cit.*, 223; 1 Massé, *Le Droit Commercial dans ses Rapports avec le*

having still the old calendar, it is reasonable to calculate the day of maturity according to the calendar in use where the instrument is payable.<sup>19</sup>

There is much authority also for the proposition that all matters relating to the performance of a contract, or to the consequences resulting from non-performance, should be governed by the law of the place of performance, irrespective of the law governing the effects of contracts in general. On this point there is, however, much diversity of opinion. The older view was that matters relating to the performance of a contract should be determined by the law of the place of performance. On the continent the names of Bartolus, Foelix, and Fiore are most prominently connected with this view. Induced probably by a desire to reconcile certain passages of the *Corpus Juris Civilis*, some of which were deemed to demand the application of the law of the place of contracting, and others, the law of the place of performance, Bartolus made a distinction between the natural consequences of a contract, i. e., the consequences which arise out of the contract itself, in regard to which the law of the place of contracting would control, and the consequences which arise *ex post facto* from negligence or delay in performance, which would be controlled by the law of the place of performance. If the place of performance was not specified in the contract, Bartolus applied the law of the forum, which he regarded as the place where such negligence or delay occurred.<sup>20</sup>

Foelix maintains that the law of the place of contracting should determine the "effects" of a contract, while the "consequences" thereof should be governed by the law of the place of performance. The "effects" of a contract, according to Foelix, arise from the very nature of a contract and are the rights, duties, etc., which the parties positively intended to create. The "consequences" of a contract, on the other hand, are, according to this writer, the rights, duties, etc., which the legislator created in connection with the performance of the contract. They do not inhere in the contract, but result from events arising subse-

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*Droit des Gens et le Droit Civil* (1844) 546; 2 Rolin, *op. cit.*, 543. *Contra*: Champcommunal (1894) 8 ANNALES DE DROIT COMMERCIAL pt. II. 208; Chrétien, *Principes de Droit International Public* (1893) 153; 4 Lyon-Caen et Renault, *Traité de Droit Commercial* (4th ed. 1906-1914) 262.

<sup>19</sup> Bar, *op. cit.*, 675; Esperson, *op. cit.*, 89; 2 Grünhut, *Wechselrecht* (1897) 585; 4 Lyon-Caen et Renault, *op. cit.*, 563; 1 Massé, *op. cit.*, 570-571; Nouguier, *Les Lettres de Change* (4th ed. 1875) no. 1428; 4 Weiss, *op. cit.*, 465-466; cf. 3 Diena, *Trattato di Diritto Commerciale Internazionale* (1905) 144-146; Ottolenghi, *La Cambiale del Diritto Internazionale* (1902) 265-266. *Contra*: Audinet, *op. cit.*, 614; Bettelheim, *Das Internationale Wechselrecht Oesterreichs* (1904) 167; Champcommunal, (1894) 8 ANNALES DE DROIT COMMERCIAL, pt. II, 201; Chrétien, *op. cit.*, 142; Despagnet, *op. cit.*, 994; 2 Jetta, *La Substance des Obligations dans le Droit International Privé* (1907) 81, 111; Surville et Arthuys, *op. cit.*, 725.

<sup>20</sup> Bartolus, *Conflict of Laws* (Beale's transl. 1914) 18-20.

quent to its formation.<sup>21</sup> Foelix included among the "consequences" the mode of performance, the effect of negligence, what constitutes default or non-performance, the amount of damages resulting from such default or non-performance, and the ratification of voidable contracts.<sup>22</sup> He holds that an action for rescission by the seller for non-payment of the price results from the contract itself, and is governed, therefore, by the *lex loci*,<sup>23</sup> while an express stipulation that the contract shall be *ipso facto* terminated upon non-payment of the purchase price relates to the consequences of the contract and is governed, therefore, by the law of the place of performance.<sup>24</sup>

Fiore makes a distinction between the *vinculum juris* of a contract (*id quod actum est*), by which he means its intrinsic validity, substance and extent of the obligation, which should be subject, in his opinion, in the absence of a common nationality, to the law of the place of contracting, and the *onus conventionis* (*id quod in obligatione est*), by which he means the performance or mode of performance of the contract, which he determines with reference to the law of the place of performance.<sup>25</sup> The question whether the defendant is responsible in case of *culpa* or *dolus*, accident or *vis major*, or whether the plaintiff is entitled to specific performance or to damages concerns, according to Fiore, the *id quod actum est*.<sup>26</sup> On the other hand, the question whether fault, negligence, accident, or default exists,<sup>27</sup> or whether in the case of a sale the seller or the buyer has to bear the expense incident to delivery,<sup>28</sup> concerns the *id quod in obligatione est* and is subject, therefore, to the law of the place of performance.

Ever since Lord Mansfield's dictum in *Robinson v. Bland*,<sup>29</sup> the English and American courts have been inclined to determine the effects of contracts by the law of the place of performance, so that the problem now discussed has not been clearly before the courts.<sup>30</sup> There are dicta, however, that matters relating to performance are subject to the law of the place of performance without reference to the law governing the effects of contracts in general. The Supreme Court of the United States gave expression to this view in a celebrated dictum in the case of *Scudder v. Union National Bank of Chicago*, in which it said:<sup>31</sup>

<sup>21</sup> 1 Foelix, *op. cit.*, 248-249.

<sup>22</sup> *Id.* 254-255.

<sup>23</sup> *Id.* 250.

<sup>24</sup> *Id.* 258.

<sup>25</sup> 1 Fiore, *op. cit.*, 184-186; *Elementi di Diritto Internazionale Privato* (1905) 355; 20 ANNUAIRE, 175-177.

<sup>26</sup> 1 Fiore, *Le Droit International Privé*, 186; *Elementi*, 385.

<sup>27</sup> 1 Fiore, *Droit Int.*, 187; *Elementi*, 355.

<sup>28</sup> (1904) 20 ANNUAIRE, 176-177.

<sup>29</sup> (1760, K. B.) 2 Burr. 1081.

<sup>30</sup> "The place at which each party to a bill or note undertakes that *he himself* will pay it, is with regard to him the *lex loci contractus*, according to which his liability is governed." Mayne, *Damages* (9th ed. 1920) 275.

<sup>31</sup> (1875) 91 U. S. 406, 412.

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance."

Professor Beale accepts this statement with the modification that the effect of contracts is to be governed by the law of the state where the effect is to take place.<sup>32</sup> In support of the statement regarding the effect of contracts, he relies upon the cases of *Greenwald & Co. v. Kaster*,<sup>33</sup> *Waverly Nat'l Bank v. Hall*,<sup>34</sup> *Abt v. Bank*,<sup>35</sup> and *Hamlin v. Talisker Distillery Co.*<sup>36</sup> These cases, it is submitted, do not bear out the proposition in support of which they are cited.

In the case of *Greenwald v. Kaster*, Eckhouse and Kaster contracted a debt as partners in Pennsylvania. Suit was brought for the recovery of the debt in Pennsylvania, and judgment was taken against Kaster. Plaintiff subsequently released Eckhouse on the debt in Indiana. All the case held was that the effect of the release of Eckhouse on Kaster's liability should be determined by the law of the state in which the original debt was incurred, and the judgment was obtained. In the case of *Waverly National Bank v. Hall*, a loan of money had been made to a person about to embark in business, in consideration of a share of the profits. The loan was made in Pennsylvania, but the business was to be conducted in New York, and the question was whether there was, under the contract, a liability as partners with respect to third parties. The court held that the question was governed by the law of New York. This conclusion was reached by adopting Story's view that the law of the place of performance controls the validity, nature, obligation and interpretation of contracts whenever such law differs from the law of the place of contracting. By way of caution, however, the learned court added:<sup>37</sup> "All agree that matters connected with the performance of a contract are regulated by the law prevailing at the place of performance." There is nothing in the opinion of the court suggesting that the effect of a contract is to be governed by a special law. In *Abt v. Bank* the court held that the question whether the drawing of a draft would operate as an assignment *pro tanto* of the drawer's funds in the hands of the bank was controlled by the law of the state in which the bank was located. Of the cases cited by Professor Beale, this is the only one which might be regarded as lending color to his statement that the effect of contracts is to be controlled by the law of the place where such effect occurs. But it is manifest that the case decides only a special problem arising in the law of bills of exchange, and that it does not determine anything concerning the effect of contracts in general.

<sup>32</sup> 3 Beale, *Cases on the Conflict of Laws* (1907) 543.

<sup>33</sup> (1878) 86 Pa. 45.

<sup>34</sup> (1892) 150 Pa. 466, 24 Atl. 665.

<sup>35</sup> (1896) 159 Ill. 467, 42 N. E. 856.

<sup>36</sup> [1894, H. L.] A. C. 202.

<sup>37</sup> (1892) 150 Pa. 466, 473, 24 Atl. 665, 666.



In the English case of *Hamlyn & Co. v. Talisker Distillery* a contract had been entered into in England which was performed in Scotland. The contract provided that any dispute arising out of it should be settled by two members of the London Corn Exchange. In the instant case the House of Lords thought "that the language of the arbitration clause indicated very clearly that the parties intended that the rights under that clause should be determined according to the law of England," and concluded accordingly that the clause was valid and would oust the jurisdiction of the Scotch courts. This case shows merely that where parts of a contract are to be performed in different countries the performance of the different parts may be subject to different laws.

The notion that all matters connected with the performance of a contract should be subject to the law of the place of performance without reference to the law governing the contract as such and the rights and duties arising therefrom appears to be very plausible at first sight, and so far as the mode of performance is concerned, the *lex loci solutionis* should control for obvious reasons of convenience. As to matters connected with the performance of a contract in other respects, the question becomes, however, upon closer examination, more difficult. Many able minds have addressed themselves to the solution of the problem, on the continent, but they have found it impossible to draw a clear line of division between the rights and duties arising from the formation of the contract as such, and those connected with its performance. The illustrations given above from Foelix and Fiore show the disagreement between these two authors. If their conclusions were examined in greater detail and compared with those of the other writers subscribing to this doctrine, we would be forced to agree with Laurent that "the distinction is so subtle as to be almost incomprehensible."<sup>38</sup> The vast majority of modern writers have reached the conclusion that no distinction can be made on principle between the direct and indirect consequences, or the effects resulting from the contract on the one hand and those resulting from non-performance on the other.<sup>39</sup> A. Rolin voices their opinion when he says in substance:

"The above distinction has been overthrown by modern science as too vague and too difficult of application."<sup>40</sup>

The contention has been made that there is a fundamental difference between the primary rights and duties arising from a contract and the

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<sup>38</sup> 7 Laurent, *op. cit.*, 552.

<sup>39</sup> Aubry (1896) 23 CLUNET, 731 ff.; Audinet, *op. cit.*, 292; Bossion, *op. cit.*, 244 ff.; Chausse (1886) 35 REVUE CRITIQUE, 693-694; 2 Cónde y Luque, *Derecho Internacional Privado* (1907) 311 ff.; Despagnet, *op. cit.*, 897 ff.; Dreyfus, *op. cit.*, 367; Gabba (1908) 22 ANNUAIRE, 264; Gestoso y Acosta, *Curso Elemental de Derecho Internacional Privado* (1900) 477; 7 Laurent, *op. cit.*, 552; Harburger (1902) 19 ANNUAIRE, 137; Pillet, *Cours*, 331; *Principes*, 440-441; 1 Rolin, *op. cit.*, 524 ff.; Surville et Arthuys, *op. cit.*, 301, 315 ff.

<sup>40</sup> (1908) 22 ANNUAIRE, 83.

secondary duties arising from its breach. In the case of *Healy v. Gorman*,<sup>41</sup> in which the question related to the law governing the rate of interest upon non-payment of a note which had been executed in New York and was payable in New Jersey, the learned court used the following language:<sup>42</sup>

"The contract did not carry interest upon the face of it, but upon default of payment at the day and place, the law of this state tacitly annexes an obligation thenceforth to pay interest until the debt is liquidated. . . . The contract itself was for payment at a day certain. It did not contemplate a failure in the performance, and therefore made no provisions in anticipation of such an event; but left the law to take its course in case of a breach of the contract. Since, therefore, the event which gave rise to and legalizes the plaintiff's claim to interest, happened in this state; or in other words, since it was *here* that the right to interest accrued, and by operation of *our* law that it becomes payable, the rate of interest must be such as is allowed in this state."

The same argument is advanced to show that the measure of damages should be controlled by the law of the state in which the defendant agreed to perform.<sup>43</sup> This line of reasoning rests upon the so-called territorial theory. In substance it amounts to this—the failure to perform having occurred in the above case in the state of New Jersey, the law of that state has an exclusive power to define the consequences that should attach to the breach of the contract. If the defendant had been in New Jersey at the maturity of the note, and had declined to pay, the territorial power of the state of New Jersey could, of course, in accordance with the traditional Anglo-American theory, impose upon the defendant the duty to pay damages for non-payment. Again, if the defendant had been a citizen of New Jersey, the personal relationship between him and the state might, consistently with Anglo-American views, suffice to confer upon the state of New Jersey the power to impose upon the defendant the duty to pay interest by way of damages. It did not appear in the case, however, that the defendant was in the state of New Jersey at the time of the maturity of the note, or at any other time or that he was a citizen of the state. The learned court does not inquire into these facts, but considers the circumstance that the note was payable in New Jersey as an event happening in New Jersey which gave rise to the plaintiff's claim to interest. Applying Story's definition of the territorial theory in its broadest possible form, it is difficult to see how it can be stretched to include an "event" such as the above, i. e. a

<sup>41</sup> (1836) 15 N. J. L. 328.

<sup>42</sup> *Id.*, 329.

<sup>43</sup> Professor Beale commenting upon the decision of *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 558, says: ". . . The court intimated that where they are different the measure of damages, like the obligation of the contract itself, is determined by the law of the place of making. This notion seems to lose sight of the fact that the right to damages forms no part of the original obligation, and is created, not by the contract, but by the law upon breach of the contract." 4 Sedgwick, *Damages* (9th ed. 1912) 2759, note.

mere failure to pay a note which the defendant had executed in another state. The reasoning of the court in *Healy v. Gorman*, above quoted, is another illustration tending to show that the so-called territorial theory, instead of solving problems in the conflict of laws, leads only to muddled thinking on the subject.

In reality the question is whether the law of the forum on grounds of policy should incorporate the rate of interest or the measure of damages governing in the state in which the defendant agreed to pay or to perform, or in which the breach actually occurred, or whether these matters should be determined by the law governing the contract in general. Which rule should the forum prescribe when the parties are silent on the subject? In favor of the application of the law of the place of performance or of the place in which the breach occurred it has been argued that, in as much as the rule governing contracts in general rests upon the probable intention of the parties, it is inapplicable to the consequences resulting from non-performance, because the parties cannot be deemed to have contracted with reference to its breach.<sup>44</sup> The great majority of the courts and writers<sup>45</sup> in recent years agree, however, with Laurent when he says: "One cannot think of performance without thinking at the same time of non-performance."<sup>46</sup> So far as the parties think about the legal consequences of their contract Laurent's statement is no doubt correct. Actually the parties rarely think about the legal consequences of their acts. If the consequences resulting from the execution of a contract are controlled on grounds of policy by the law governing the contract, although they were not present to the minds of the parties, similar considerations of policy may suggest that the consequences resulting from non-performance should be governed by the same law. It is possible, on the other hand, that, with regard to the latter, other considerations of policy may require the application of the law of the place of performance. The writer believes that such considerations exist in the matter of moratory interest. Most countries have adopted a legal rate of interest as the measure of damages for the payment of money, representing the average value of money in such country. As the value of the money at the place where it was agreed to be paid represents, in the normal case, plaintiff's loss, the legal rate prevailing at that place should control.<sup>47</sup> The same argument does not apply, however, to the measure of damages for the breach of contracts other than those calling for the payment of money. The rules of damages of the different countries arise from considerations of a purely juridical order, and do not represent differences in the economic value

<sup>44</sup> 1 Foelix, *op. cit.*, 252; 1 Fiore, *op. cit.*, 186.

<sup>45</sup> Audinet, *op. cit.*, 292; Bossion, *op. cit.*, 261; Chausse (1886) 35 REVUE CRITIQUE, 693-694; Despagnet, *op. cit.*, 899; Dreyfus, *op. cit.*, 369, 370; Jettel, *op. cit.*, 108; Pillet, *Cours*, 331; *Principes*, 440-441; 1 Rolin, *op. cit.*, 524; 527.

<sup>46</sup> 7 Laurent, *op. cit.*, 556-557.

<sup>47</sup> Lorenzen, *op. cit.*, *supra*, note 15, at p. 172; 3 Fiore, *op. cit.*, 258.

of plaintiff's contract in those countries. From the standpoint of justice there is no apparent reason, therefore, why a contract that is governed in general respects by the law of the place of contracting should be subject as regards the measure of damages to the law of the place of performance.<sup>48</sup>

The rules that should govern the effects of contracts may be summarized as follows:

- (1) The effects of contracts are governed by the law of any state chosen by the parties.
- (2) If the intention of the parties is not expressed, the effects of contracts shall be governed by the law of the specified place of performance.
- (3) If the intention of the parties does not appear and no place of performance is specified the law of the place of contracting shall control.
- (4) The law so governing determines not only the primary rights and duties arising from the contract but also the secondary rights arising from its breach.

However, the legal rate of interest for the non-payment of money shall be determined by the law of the place of payment.

- (5) The mode of performance is governed by the law and usages of the place of performance.
- (6) Where the effect of a contract depends upon the meaning of certain terms designating the price, weight, or measure, or the time of performance, reference shall be had to the terminology of the place of performance, unless it appears from the circumstances that the parties used them in a different sense.

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<sup>48</sup> Asser, *op. cit.*, 81; Audinet, *op. cit.*, 292; Baudry-Lacantinerie & Barde, *Traité Théorique et Pratique de Droit Civil*, tit. *Obligations* (1905) no. 497; Chausse (1886) 35 *REVUE CRITIQUE*, 693-694; 2 Conde y Luque, *op. cit.*, 313; Despagnet, *op. cit.*, 912; 3 Diena, *Trattato*, 209; 7 Laurent, *op. cit.*, 556; Ottolenghi, *op. cit.*, 469; Pillet, *Cours*, 331; 1 Rolin, *op. cit.*, 527-528; Surville & Arthuys, *op. cit.*, 738-739. But compare 3 Lyon-Caen et Renault, *op. cit.*, no. 35.