

FOREIGN CURRENCY OBLIGATIONS

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I

The object of the present essay is to discuss a few of the many aspects of foreign currency obligations, with special reference to conflicts of law.

Money is a subtle concept.¹ "As regards money, we should know that it acquires its function naturally, not by reason of its material alone, nor by reason of a special name or form, but because it has a more general character by which it is compared either with all things, or with the things that are most necessary."² In modern society, the domestic currency of a state is fixed by the laws of that state and, according to Blackstone, "money is the medium of commerce, it is the King's prerogative, as the arbiter of domestic commerce, to give it authority or make it current".³ In Canada, the domestic currency is determined by the Currency, Mint and Exchange Fund Act.⁴

II. *Money of Account Distinguished from Money of Payment*

In foreign money obligations there is a fundamental distinction between the money of account (or money of contract) and the money of payment. The money of account is the financial measure of the obligation. The money of payment is the system of monetary units in which the obligation is to be discharged. If the obligation in terms of money of account is \$280 Can., the money of payment pounds

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¹ For a discussion of the meaning of foreign currency see, for example, Nussbaum, *Money in the Law* (1950) pp. 318 *et seq.*, and Mann, *The Legal Aspect of Money* (2nd ed., 1953) pp. 141-142.

² Grotius, *De Jure Belli ac Pacis*, Vol. 2, Book 2, Chap. 12. Cf. Hume, *Essay on Money*: "It is none of the wheels of trade: it is the oil which renders the motion of the wheels more smooth and easy".

³ Comm., Book 1, §276.

⁴ R.S.C., 1952, c. 315. The nominal value of an item of currency is shown by a sign printed on its face: Rabel, *The Conflict of Laws, A Comparative Study*, Vol. 3 (1947), p. 18.

sterling, and the rate of exchange on the due date \$2.80 Can. = £1, then the payee is entitled to receive £100 in pounds sterling. If the rate of exchange had been \$3 Can. = £1 on the due date, the debt would have been correctly discharged by payment of £93: 6: 8 in sterling. In each case, the sum paid is the sterling equivalent of \$280 Can. The creditor receives the current equivalent, in the money of payment, of a fixed nominal amount of the money of account.⁵

Determination of the money of account may involve a question in conflict of laws. It will be incorrect, for example, to apply English common-law rules of interpretation to decide whether Canadian dollars or sterling is the money of account, if in fact the applicable law for this purpose is the law of Quebec. The conflicts problem must be solved first, and in doing so, of course, the court should apply the conflicts rules of the forum.⁶

III. *Proper Law and Money of Account*

The prevailing opinion in the common-law jurisdictions is that the interpretation of a contract is governed by its proper law.⁷ The proper law is defined by Falconbridge as "the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed . . .".⁸ Article 8 of the Quebec

⁵ See Mann, *ante* footnote 1, pp. 158-159; Nussbaum, *ante* footnote 1, p. 376. See also, International Law Association, Dubrovnik Conference, 1956, Revised Draft Convention on Payment of Foreign Money Liabilities. See also (1956), 5 Amer. J. of Comp. L. 512 (comment on arbitration between United Kingdom and Greece).

⁶ Falconbridge, *Conflict of Laws* (2nd ed., 1954) Chap. 1.

⁷ Cf. *Wilson v. Metcalfe Construction Company*, [1947] 1 W.W.R. 1089, 2 W.W.R. 603; *Livesley v. Clement Horst Company*, [1924] S.C.R. 605, at p. 610. See, however, American Restatement, *Conflict of Laws*, §§332 *et seq.* The French Draft Law on Private International Law, as adopted by the Commission for the Reform of the Civil Code (1951), states that when the parties have not clearly expressed their intention, contracts are governed by the place of contracting (except contracts relating to the establishment or transfer of a right *in rem* in movable or immovable property). The Draft Law has been criticized by the French Committee of Private International Law as not giving enough freedom to the judge. See articles in (1956), 5 Int. & Comp. L. Q. 378, and (1955-6), 30 Tul. L. Rev. 523. Recent cases illustrative of the points of view in the United States as regards applicable law in contracts include: *George Realty Co. v. Gulf Refining Co.* (1936), 264 N.W. 411; *Elk River Coal Co. v. Funk* (1937), 271 N.W. 204; *Frankel v. Allied Mills* (1938), 17 N.E. 2d 570; *Gray, McFawn & Co. v. Hegarty, Conroy & Co.* (1939), 109 F. 2d 443; *Bitterman v. Schulman* (1943), 39 N.Y.S. 2d 495; *Shane v. Commercial Casualty Insurance* (1943), 132 F. 2d 544; *Cockburn v. O'Meara* (1944), 141 F. 2d 779; *Wm. J. Lemp Brewing Co. v. Ems Brewing Co.* (1947), 164 F. 2d 290; *Mason v. Rose* (1949), 176 F. 2d 486; *Jansson v. Swedish American Line* (1950), 185 F. 2d 212; *Getlin v. Maryland Casualty Co.* (1952), 196 F. 2d 249; *Auten v. Auten* (1954), 124 N.E. 2d 199; *M. W. Zaack Co. v. R. D. Werner Co.* (1955), 222 F. 2d 634; *Bierman v. Marcus* (1956), 140 F. Supp. 66.

⁸ *Ante* footnote 6, pp. 384-385. Cf. Dicey, *Conflict of Laws* (6th ed. 1949) p. 619; Cheshire, *Private International Law* (4th ed., 1952), p. 214;

Civil Code states that contracts are to be interpreted according to the *lex loci contractus*, unless there is a law to the contrary, or the parties have agreed otherwise, or by the nature of the contract "or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place".⁹

The common-law rules, as suggested by Dicey,¹⁰ are that in the absence of express intention or an intention which can be implied from the contract, there will be two presumptions, (a) the *lex loci contractus*, (b) where the contract is to be performed wholly or partly in a country other than that in which it has been made, the *lex loci solutionis*, at least in relation to the mode of performance. In *Johnson v. Pratt*,¹¹ a mortgage was made in Winnipeg and the defendant covenanted to pay "\$43,000 in gold or its equivalent at the office of the mortgagee in the City of Detroit . . .". The interest was to be paid at the same place "in gold or lawful money of Canada . . .". The question was whether the money of account was \$Can. or \$U.S. Adamson J. referred to the statement in the fifth edition of Dicey that when "the contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*)".¹² But a bond or similar obligation may provide for payment in more than one place. For example, in *Royal*

Robinson v. Bland (1760), 1 W. Bla. 234, at p. 257; *Anspach v. C.N.R.*, [1950] O.R. 317. There is also the problem (not here considered) whether the parties should be allowed to select a particular system of law to avoid the application of a system with which the contract is more closely connected. See Cheshire, *ante*, pp. 199-212; Morris and Cheshire (1950), 56 L.Q.Rev. 320; Nussbaum (1942), 51 Yale L.J. 893; Yntema (1952), 1 Amer. J. of Comp. L. 341; *Vita Food Products v. Unus Shipping Company*, [1939] A.C. 277; *R. v. International Trustee*, [1937] A.C. 500; *The Tornii*, [1932] P. 28.

⁹ Johnson, *The Conflict of Laws with Special Reference to the Law of the Province of Quebec*, Vol. 3 (1937), pp. 408-409. This is subject to article 13 by which no one "can by private agreement validly contravene the laws of public order and good morals". As to a similar principle in the common law, see Falconbridge, *ante* footnote 6, pp. 386-388, Dicey, *ante* footnote 8, pp. 604-607. Even if lawful by its proper law, a contract is normally invalid when its performance is unlawful by the *lex loci solutionis*: *Ralli Brothers v. Campania Naviera, etc.*, [1920] 2 K.B. 287; *De Beeche v. South American Stores*, [1935] A.C. 148.

¹⁰ *Ante* footnote 8, pp. 584, 589, 593-594. See also, Nussbaum, *ante* footnote 1, at p. 377, as to the *locus solutionis* in regard to interpretation. ¹¹ [1934] 2 D.L.R. 802. See Mann *ante* footnote 1, p. 202, note 2.

¹² P. 672. For the expression of the principle in the sixth edition see *ante*. See also Lord Hamworth M.R. in *Broken Hill Proprietary Company v. Latham*, [1933] 1 Ch. 373. Lord Hamworth dissented in this case and the majority found it unnecessary to determine the point on the ground that the rules of interpretation in England and Australia were the same. See Lawrence L.J. at p. 399.

*Trust Company v. Oak Bay*¹³ debentures were payable "at any branch of the Bank of British North America, either at Victoria, B.C., Toronto, Montreal, the City of New York, U.S.A., or London, England, at the holder's option".¹⁴ Hence, on application of the Dicey rules, if the proper law is presumed to be the place of performance in such a contract, and there is nothing to rebut the presumption, there can be more than one proper law. Possibly, in these circumstances, if the holder of a bond has opted for payment at one of the specified places, the law of that place should be presumed to be the proper law and will determine the money of account.¹⁵

In *Adelaide Electric Supply Company v. Prudential Assurance Company*,¹⁶ Lord Wright said it was established *prima facie* that, "whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract". He mentions by way of explanation that "an essential element in the foreign law of the place of performance, when the performance is the payment of money, is the law of currency or legal tender governing in that place" and cites, *inter alia*, *Ralli Brothers v. Compania Naviera, etc.*, a case which lends support to the proposition that a contract is generally invalid as to performance if it is unlawful by the *lex loci solutionis*.¹⁷ It may be that Lord Wright was referring only to the *prima facie* presumption that where a contract is to be performed in a country other than that of the *locus contractus* (which would otherwise be the proper law), the *lex loci solutionis* should govern, at least in relation to the mode of performance.¹⁸ The *Adelaide* case was discussed by Lord Wright in *Auckland Corporation v. Alliance Assurance Company*,¹⁹ where he said that there had been applied, in the *Adelaide* case, the principle that in regard to "matters which can be fairly described as being the mode or method of performance" of the contract, the contract ought to be governed by the *lex loci sol-*

¹³ [1934] 4 D.L.R. 697.

¹⁴ Nussbaum says that in this case an "*option de change* was, so to speak, disguised as an *option de place*", *ante* footnote 1, p. 393.

¹⁵ See Dicey, 6th ed., at p. 601, however, where it is said that "there does not appear to be any English case in which the court has imputed to the parties an intention to this effect".

¹⁶ [1934] A.C. 122, at p. 151.

¹⁷ [1920] 2 K.B. 287; Dicey, 6th ed., p. 637. Lord Wright also refers to Dicey, 2nd ed., at p. 553 (which corresponds to Dicey, 5th ed., at p. 672) approved by Lord Warrington in the *Ralli* case.

¹⁸ Mann, *ante* footnote 1, p. 178, considers that Lord Wright's statements in the *Adelaide* case on this matter are "certainly too widely formulated".

¹⁹ [1937] A.C. 587.

tionis.²⁰ Apart from Lord Wright, who thought there was a problem as to what was the money of account, the judges in the *Adelaide* case considered that the English pound and the Australian pound were the same at the relevant time, so that there was only one unit of account, and that the real problem was to determine the money of payment. The general rule is that the money of payment is to be determined by the *lex loci solutionis*.²¹ Perhaps, therefore, Lord Wright was referring in the *Auckland* case to the majority view in the *Adelaide* case, not to his own view,²² and was saying, in effect, that the case supported the rule that the money of payment should be determined in accordance with the *lex loci solutionis*. In *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society*²³ Lord Wright said that in the *Adelaide* case the House of Lords had not laid it down "that the law of the place of performance applied for all purposes relating to performance, even to the extent of changing the substance of the obligation expressed or embodied in the contract . . .", but had been concerned only with "the particular matter of the currency in which payment was to be made".²⁴ In *British & French Trust Corporation v. New Brunswick Railway Company*, the question at issue was the enforcement or not of a gold clause, and Scott L.J. said that, although "we are bound to conclude that the *lex loci contractus* is the proper law of the contract for the general purpose of interpreting its obligations, I do not think that this conclusion affects the interpretation of the payment clause, and still less does it affect its judicial enforcement in London. To that part of the contract the *lex loci solutionis* is, in my opinion, applicable."²⁵

There is a rule stated in Dicey that a contract lawful by its prop-

²⁰ At p. 606.

²¹ Dicey, 6th ed., at p. 740. Cf. *Zimmerman v. Sutherland* (1927), 274 U.S. 253.

²² Lord Wright also said that in the *Auckland* case, as in the *Adelaide* case, the pound was the common unit of account and that the question at issue was to determine the money of payment: pp. 590, 591 and 594. See also discussion of the *Adelaide* case in *British & French Trust Corporation v. New Brunswick Railway Company*, [1938] A.C. 1, [1937] All E.R. 516, at pp. 543-544, per Scott L.J.

²³ [1938] A.C. 224, at p. 241.

²⁴ "Substance of the obligation" is a phrase used by Lord Wright in *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society*, to include, for example, "a reduction in the amount of the debt or other liability, or other change in the contractual obligation", [1938] A.C. 224, at p. 241.

²⁵ [1937] 4 All E.R. 516, at pp. 541, 543. Cf. *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, concerning a gold clause where the *lex loci contractus* was applied. The construction of a gold clause is governed by the proper law: *St. Pierre v. South American Stores*, [1937] 3 All E.R. 349.

er law "is, in general, invalid in so far as the performance of it is unlawful" by the *lex loci solutionis*.²⁶ It is argued by Falconbridge and by others, that this rule is unsound and that the authorities ought to be explained as applications of domestic rules on frustration of contract, not as applications of a principle of conflict of laws.²⁷ This rule, however, affects only the mode and money of performance and not the process of discovering the money of account.

It is hard to say, on the English and Canadian authorities, whether there is any conflicts principle connecting the money of account with the mode of performance, leading to a *prima facie* presumption in favour of the law of the place of payment as the governing law. In *Jacobs v. Credit Lyonnais*,²⁸ Bowen L.J. said that in most cases, "no doubt, where the contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law . . ." The payment is to be made in the foreign country in units of legal tender of that country, and the question to be determined is, how many units. In these simple circumstances, there is no doubt something to be said for measuring the obligation in units of money of payment, that is, for taking the foreign law as the proper law of the contract.²⁹

IV. *Determination of the Proper Law*

In determining the proper law the first question should be whether there is anything in the contract, express or implied, indicating a choice by the parties, or whether the surrounding circumstances imply any mutual intention. "When two parties living under different systems of law enter into a personal contract, which of the systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties. . . ."³⁰

²⁶ 6th ed., p. 637.

²⁷ Falconbridge, *ante* footnote 6, pp. 289-394, and other literature mentioned in Dicey, 6th ed., at p. 639.

²⁸ (1884), 12 Q.B.D. 589.

²⁹ According to Cheshire, *ante* footnote 8, p. 236, "Presuming that there has been no express designation of the monetary system within the framework of which it was intended that the debtor's obligation should be measured, the question becomes a matter of implication. No one factor is necessarily decisive."

³⁰ *Hamlyn v. Tallisker Distillery* (1894), 21 R. (H.L.) 21, at pp. 25-26 [1894] A.C. 202, at p. 212, *per* Lord Watson.

If the parties have made no choice of applicable law expressly or impliedly, it has been said that the court should impute an intention to the parties.³¹ This is an application of the general principle that the court may impute a term in order to give "business efficacy" to a contract.³² But, where there is no indication of a choice of proper law by the parties, an imputed term is a legal fiction.³³ The object of the fiction is to preserve formally intact the principle that the court does not make a contract for the parties but deals with the contract which the parties have made. It is submitted that such a fiction is unnecessary and that it tends to give the reasoning an air of unreality.³⁴ Surely, in general terms, where there has been no selection by the parties, the court should select that law which, having regard to all the circumstances, can be most fairly and logically applied to the contract—a more rational approach than trying to decide which law to impute, as their choice of proper law, to parties who never made any choice at all.

Where no selection has been made by the parties, should the court apply Dicey's presumptions?³⁵ Although not accepted in English law as an absolute rule, the *lex loci contractus* has indeed been received as a distinguished presumption. But even as a presumption it can produce artificial results, such as, for example, if it is applied to a contract between A, a Greek, and B, a Frenchman, made in Florida (while they are both vacationing there) for the loan of sums of money over a certain period, and without indication of a choice of proper law or specification of a place of performance. The presumption in favour of the *lex loci solutionis* is supported by Lord Esher in *Chatenay v. Brazilian Submarine Telegraph Company*:³⁶

³¹ Cf. *R. v. International Trustee*, [1937] A.C. 500; *Mount Albert B.C. v. Australasian Assurance Society*, [1938] A.C. 224. Dicey (6th ed.) at page 579 refers to the proper law as the law which the parties intended "or may fairly be presumed to have intended . . .".

³² The doctrine of *The Moorcock* (1889), 14 P.D. 64. A similar question arises in relation to the theory of frustration of contract and there the implied or imputed term concept has been much criticized. See Baxter (1954), 32 Can. Bar Rev. at pp. 875-876.

³³ It is a fiction because it relates "to nothing in the minds of the parties at the time the contract was made": *James Scott and Sons Ltd. v. Del Sel*, 1922 S.C. 592, at pp. 596-597.

³⁴ Cf. *The Assunzione*, [1954] 2 W.L.R. 234, per Birkett L.J. at p. 259, 1 All E.R. 278; (1954), 17 Mod. L. Rev. 255.

³⁵ *Ante* footnote 8, pp. 593-594.

³⁶ [1891] 1 Q.B. 79. Story, *Conflict of Laws* (8th ed.), §280, was cited in argument. Story states that where a contract is to be performed in a jurisdiction other than the *locus contractus* "the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance". In *Jacobs v. Credit Lyonnais* (1884), 12 Q.B.D. 589, at p. 601, Bowen, L.J. said that in most cases "no doubt where a contract has to be wholly performed abroad, the reasonable presumption may

"But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract contrary to the laws of that country." The case concerned the construction of a power of attorney executed abroad in favour of an English broker to buy and sell shares, and the court decided that English law applied. But the result can be justified on grounds of commonsense and convenience without using any presumption. The agent, buying or selling shares in England, had to do so according to English law, and those to whom he produced the power of attorney in that connection would have found it, at least, more convenient to interpret the attorney's powers also according to English law.³⁷ In *Benaim v. Debono*,³⁸ Lord Darling approved the second presumption of Dicey, as it appeared in the third edition.³⁹

It seems traditional in the common law, when the parties have indicated no proper law, to regard the *locus contractus* and the *locus solutionis* as important considerations among "the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties".⁴⁰ It is submitted, however, that reverence for the *locus contractus* and the *locus solutionis* should not be carried farther than this. They should be regarded as factors to be taken into account and to be accorded due weight, and not as presumptions such that if there is no rebutting evidence the case will be ruled by the presumption. So it is suggested that the court is free to consider factors other than the *locus contractus* or the *locus solutionis* and to decide on a proper law which is the law of neither the place of contracting nor of the place of performance.⁴¹

be that it is intended to be a foreign contract determined by foreign law". Cf. *Liebeskind v. Mexican Light & Power Company Ltd.* (1941), 116 F. 2d 971; *South American Petroleum Corporation v. Colombian Petroleum Company* (1942), 31 N.Y.S. 2d 771; *Mountain Lumber Company v. Davis* (1926), F. 2d 478, 11 F. 2d 219.

³⁷ Cf. Lindley L.J. at p. 85.

³⁸ [1924] A.C. 514, at p. 520.

³⁹ At page 609.

⁴⁰ *Hamlyn & Co. v. Talisker Distillery* (1894), 21 R. (H.L.) 21, at p. 26, [1894] A.C. 202, at p. 212, per Lord Watson.

⁴¹ Although this would appear to be the logical view, the common-law courts have shown a great affection for the *locus contractus* and the *locus solutionis*, largely due to the peculiar position which these *loci* have occupied in the historical development of this branch of the law. The traditional

What will probably be the important circumstances, other than the *locus contractus* and the *locus solutionis*, for a court to consider, in an international bond issue where the parties have indicated no choice of law, and the question is one of interpretation?⁴² The bonds will be issued to persons in different countries, and there may be a variety of places of contracting and places of payment. There is much to be said for interpreting all the bonds of the same issue against the same proper law, for this will tend towards equal treatment of all bondholders, and otherwise bonds purchased by *A* in country *X* may be interpreted by a different system of law from bonds of the same issue purchased by *B* in country *Y*. Also, the domicile of the issuing party normally has the merit of being simple to determine.⁴³ There may, however, be complicating factors in the circumstances of the bond issue. For example, the bonds may not be issued directly by the issuing party but may be issued by agencies in different countries, and the bonds may contain an option as to currency or as to place of payment, perhaps inserted in order to make the issue more attractive in a particular country.⁴⁴ In these circumstances there may be logical grounds for preferring a proper law having some connection with, say, the *lex loci contractus*, to a proper law which would yield uniform rules of interpretation. It might be argued, however, that it is a truer analysis of such situations to say that the factors beneficial to the bondholders of a particular country imply that the parties had intended the *lex loci contractus* to be the proper law. Such an analysis would mean that the parties had made a mutual choice of law, that choice being implicit in the circumstances of the contract.

It is often said that the court should inquire with what system of law the contract is most closely connected, considering all the circumstances including the *locus contractus*, the *locus solutionis*, the residence and domicile of the parties, the language and form of

emphasis on the *locus contractus* and the *locus solutionis* in the common law seems to have produced confusion in some of the English cases. See the discussion, *ante*, of cases such as *Adelaide Electric Supply Company v. Prudential Assurance Company*, [1934] A.C. 122; *Auckland Corporation v. Alliance Assurance Company*, [1937] A.C. 587; *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society*, [1938] A.C. 224. In the Quebec Civil Code, the emphasis is on the *locus contractus*. See art. 8.

⁴² Cf. Rabel, *The Conflict of Laws*, Vol. 3 (1950), pp. 4 *et seq.*

⁴³ "The domicile of a corporation is the country in which it is registered. If it is not required by law to be registered, its domicile is in the country by the law of which it is incorporated." (Dicey, 6th ed., p. 126)

⁴⁴ Option de change; option de place: Nussbaum, *ante* footnote 1, pp. 387 *et seq.* Such options are not restricted to bonds. See *Booth v. Canadian Government* (1933), 63 F. 2d 240, concerning freight charges on a bill of lading.

the contract.⁴⁵ The court then has the problem of determining the relative importance of these different circumstances. But in the final analysis, if the court considers that there is no indication of choice of law by the parties, there does not seem to be any difference in substance between this method and saying that the court should select that law which, having regard to all the circumstances, can be most fairly and logically applied to the contract. However, if a number of the relevant circumstances all connect with one legal system, this may allow the court to decide that the parties had made a mutual choice of law impliedly, because the circumstances were such as to give the contract, for example, a distinctive "Canadian", "English" or "French" flavour.

Another question which could arise in theory is whether the court may take into account the consequences of choosing a particular law, where the parties have made no selection express or implied.⁴⁶ For example, in the common-law jurisdictions, there is a domestic rule of construction that the parties intended that the obligation be measured in the currency of the *locus solutionis*.⁴⁷ This rule has been said to be based on commonsense.⁴⁸ If a court is faced with a choice of proper law between the law of *A*, which includes this domestic rule, and the law of *B*, which has a different domestic rule, is the court entitled to be influenced by its opinion that selection of the law of *A* will lead to the more just and reasonable final result, because of the nature of *A*'s domestic rules? It might perhaps be argued that, in the interpretation of a contract, the fundamen-

⁴⁵ Cf. the "centre of gravity" theory, which was explained as follows in *Auten v. Auten* (1954), 308 N.Y. 155, 124 N.E. 2d 99, at p. 101: "... the courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute' ". The idea behind the theory, it was said, was to give control over the legal issues to the place with most interest in the problem and to allow the forum to apply the policy of the jurisdiction "most intimately concerned with the outcome of the particular obligation". See also comment in (1955), 40 Cornell L.Q. 772.

⁴⁶ Cf. *Swift & Co. v. Bankers Trust Co.* (1939), 19 N.E. 2d 992, at p. 995, where it was said that in deciding between the *lex loci contractus* and the *lex loci solutionis*: "Perhaps pragmatic determination may in such cases be indicated by the nature of the problem, and the test whether one rule or the other produces the best practical result may be the safest guide in the search for the intention, actual or assumed, of the parties". See also reference to this passage in *Auten v. Auten* (1954), 308 N.Y. 155, 124 N.E. 2d 99, at p. 101.

⁴⁷ Dicey (6th ed.) p. 734; *Simms v. Cherrenkoff* (1921), 62 D.L.R. 703, Mann, *ante* footnote 1, pp. 190-191.

⁴⁸ *Per* Best C.J. in *Taylor v. Booth* (1824), 1 C. & P. 286: "If a man draws a bill in Ireland upon England, and states that it is for sterling money, it must be taken to mean sterling in that part of the United Kingdom where it is payable: common sense will tell us this".

tal object of the court is simply to obtain the fairest and most commonsense interpretation, and that this cannot be done without giving some consideration, before choosing the proper law, to whether the domestic rules of country *X* will give, finally, a fairer and more reasonable interpretation than the domestic rules of country *Y*. It may be objected, however, that the court's function is to seek a solution in accordance with the conflict rules of the forum, and that these rules should not place upon the court the duty of comparing the relative fairness and reasonableness of different domestic systems. On the other hand, it is conceivable that the domestic consequences might have a psychological effect on a judge's choice of proper law where there is nothing to indicate a choice by the parties. It might be a hidden mental influence on the judge's choice of proper law that a certain choice would lead to domestic rules with which he was familiar and as to the commonsense and fairness of which he was persuaded.

V. Illustrations of the Conflicts Problem

It is now proposed to mention a few cases to illustrate the kind of problem which may arise. In *Derwa v. Rio de Janeiro Tramway, Light & Power Company*,⁴⁹ bonds were held by a Belgian subject resident in Belgium. The head office of the issuing company was in Ontario and each bond contained a promise to pay 12.50 francs in Paris, Brussels or Toronto as half-yearly interest on a 5% gold bond. Rose J. stated that the contract was to be construed according to Ontario law.⁵⁰ The obligation was to pay so many francs at the selected place of payment (which was Toronto), so that francs constituted the money of account.

A more complicated situation arose in *Royal Trust Company v. Oak Bay*.⁵¹ In certain debentures, the sum payable was expressed as—"Five Hundred dollars of lawful money of the Dominion of Canada or £102:14:10, its sterling equivalent, at the rate of \$4.86 $\frac{2}{3}$ to the one pound sterling, on the thirteenth day of November, 1933", at Victoria, B.C., Toronto, Montreal, New York City or London, at the holder's option. The holder demanded payment in sterling at Victoria. The court came to the conclusion "that the purpose of inserting the words under discussion was to fix the rate of exchange. Under those circumstances the English investor would never be in doubt as to what sum he would get on the maturity of

⁴⁹ [1928] 4 D.L.R. 542 (Ontario).

⁵⁰ At page 551.

⁵¹ [1934] 4 D.L.R. 697. Cf. *Gatineau Power Company v. The Royal Trust Company*, [1945] S.C.R. 655.

the debentures, namely, the exact sum he loaned, and the defendant would know exactly what it had to pay, namely, the exact sum it borrowed.”⁵² It was held that the plaintiff was entitled to receive \$10,000 Can. in respect of the twenty debentures it held. Robertson J. referred with approval to the principle that an “English Court . . . cannot give judgment in foreign currency, there being no power to enforce such a judgment”.⁵³ If, therefore, the investor sought payment in Canada, he would receive \$500 Can. per debenture and if he sought payment in England, he would receive £102:14:10 per debenture, irrespective of the current rate of exchange between the Canadian dollar and the pound sterling.⁵⁴ London was made one of the places of payment, and the debentures were made payable in English pounds, “to make the same attractive to English investors and for their convenience”.⁵⁵

Two interesting Quebec cases are *La Corporation des Obligations Municipales v. Ville de Montréal Nord*⁵⁶ and *Les Commissaires d'Ecole de la Municipalité Scolaire de St.-Charles v. La Société des Artisans Canadiens Français*.⁵⁷ In the first case, interest coupons were expressed payable in dollars in the United States, without specifying whether \$U.S. or \$Can. were intended. McLennan J. considered that by Canadian, United States, English and French authorities there was a presumption in the domestic law in favour of the money of the place of payment. The same domestic presumption applied, therefore, whichever law was selected as the applicable law. In the second case, payment was stated to be in dollars, without specifying whether Canadian or United States dollars, and the place of payment was Montreal or New York. The holder elected to take payment in United States dollars. It was held, following the first case, that the holder was entitled to payment of the nominal amount in United States dollars, so that United States currency was the money of account. Presumably, if the holder had elected for payment in Canadian dollars, Canadian currency would have been the money of account.

In *American Chicle Company v. Somerville Paper Box Company*,⁵⁸ both parties carried on business in the United States. The defendants owned land in Ontario on which they granted a mortgage which was assigned to the plaintiffs. The mortgage was to be

⁵² At page 704.

⁵³ At page 702. Cf. *Di Ferdinando v. Simon, Smits & Company*, [1920] 3 K.B. 409, per Scrutton L.J. at p. 415.

⁵⁴ See criticism of the decision by Mann, *ante* footnote 1 p. 170. However, the conclusion of Rose J. seems reasonable.

⁵⁵ At page 703.

⁵⁷ (1922), 33 B.R. 448.

⁵⁶ (1921), 61 D.L.R. 542.

⁵⁸ (1921), 50 O.L.R. 517.]

discharged "on payment in current gold coin at the option of the mortgagees of \$75,000 of lawful money of Canada . . .". Gold coin was currently unprocurable in Canada, but was obtainable in the United States. It was held that the mortgagees were not entitled to United States gold coin. The money of account was Canadian legal tender. In this case the place of payment was not specified in the contract. It is a general rule of domestic law in the common-law jurisdictions that a debtor must seek out his creditor to make payment.⁵⁹ But, as Hodgins J.A. correctly decided, this is not a conflicts rule. For the conflicts rule, the court went to the words of Chief Justice Draper in *Niagara Bridge Company v. Great Western Railway Company*,⁶⁰ that the contract, "being made in Canada, and mentioning no place where the stipulated payments are to be made, is to be governed in its construction by the laws of Canada and not of any foreign country".⁶¹ In the English case of *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*,⁶² the British government made an offer in New York "of 5½ per cent. secured loan convertible gold Notes". These were payable, free of British taxes, either in New York in United States gold coin or, at the holder's option, in London in sterling at the fixed rate of 4.86½ dollars to the pound. In 1933 there was a Joint Resolution of the Congress of the United States declaring that any obligation providing for discharge in gold coin or in \$U.S. measured in gold was against public policy and that instead the obligation should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public or private debts. The holders claimed that presentation for payment in New York would entitle them to \$U.S. measured in gold. Lord Atkin considered that "taking all the circumstances into consideration . . . the irresistible inference" was that the proper law was New York law, that is, both the *lex loci contractus* and the law of the place selected by the holder for payment, and that the bonds would be discharged by dollar for dollar payment of the nominal amount in ordinary \$U.S. The House of Lords did not accept the doctrine that, where a sovereign is a party to a contract, the law of the sovereign's country is intended to apply.⁶³

⁵⁹ *Duval v. Gans*, [1904] 2 K.B. 785; *Fowler v. Midland Electric Corporation*, [1917] 1 Ch. 656; *Shrewsbury v. Shrewsbury* (1907), 23 T.L.R. 277.

⁶⁰ (1863), 22 U.C.R. 592, at p. 596.

⁶¹ Cf. Dicey (6th ed.) pp. 593-594.

⁶² [1937] A.C. 500.

⁶³ This doctrine rested on a dictum of Lord Romilly M.R. in *Smith v. Wéguelin* (1869), L.R. 8 Eq. 198; *Goodwin v. Roberts* (1876), 1 App. Cas. 476, at p. 494.

VI. *Interpretation According to the Applicable Law*

Once the applicable law has been determined by applying the conflicts rules of the forum, the next step is to interpret the contract according to the domestic rules of the chosen law. These rules, of course, include the principles of interpretation of written contracts, and one finds some mention of these principles in the cases on foreign currency obligations.

In *Myers v. Union Natural Gas Company*,⁶⁴ the question was whether gas was intended to be paid for in Canadian or United States currency. Subsequent to the making of the contract, the plaintiffs contended that payment should be made in \$U.S. and the defendant's secretary-treasurer wrote in reply that this contention was correct and that future payments would be made in that currency. For some time thereafter payments were so made and then the defendants wrote to say that by error payments had been inadvertently made in \$U.S. There is a common-law principle that where a written contract is ambiguous, the acts done by the parties under the contract are admissible evidence as to its interpretation.⁶⁵ According to Tindal C.J. in *Doe dem. Pearson v. Ries & Knapp*,⁶⁶ "we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties". In the *Myers* case, the court considered (a) that "a secretary or secretary-treasurer has as such no authority to bind his company", and (b) that there was "no change of position upon which to base an estoppel in pais".⁶⁷ It was decided that the payment should be made in Canadian currency. The court apparently considered that, apart from the conduct of the secretary-treasurer, there was no doubt that payment in Canadian currency had been intended by the contract. Thus the case was not a suitable one for the application of the principle of the *Pearson* case, since there was no real ambiguity in the written contract.

In *Ehmka v. Border Cities Improvement Company*,⁶⁸ a resident of Michigan agreed to purchase land in Ontario from a company having its head office in Ontario and its seat of business in Michigan. The agreement provided for payment by instalments at the company's office in Ontario but was silent on whether Canadian or U-

⁶⁴ (1922), 53 O.L.R. 88.

⁶⁵ Cf. Halsbury (3rd ed.), Vol. 11, §666, p. 274.

⁶⁶ (1829), 8 Bing. 178, at p. 181.

⁶⁷ At p. 92. Cf. *Chapman v. Bluck* (1838), 4 Bing. N.C. 187, at p. 195.

⁶⁸ (1922), 52 O.L.R. 193. See Mann, *ante* footnote 1, pp. 187-188.

nited States currency was intended. The plaintiff voluntarily made certain payments in \$U.S. and then, when the exchange became unfavourable to him, proposed to pay in \$Can. Lennox J. stated that, if he had been reading the contract alone without evidence of the subsequent actings of the plaintiff, he would have interpreted it "to mean payment in Canadian funds". As to the plaintiff's subsequent conduct, "There may be authorities, but I need none, for the proposition that where, as here, the contract is capable of alternative constructions, and a party to it has put his own interpretation upon it before, at the time, and, by many acts, after its execution, and in the end, and after the contract has been almost completely executed upon his part, comes into Court setting up a new interpretation at variance with all that he has done in part performance, he must explain very satisfactorily the reason why, and he must, in effect, make out a case entitling him to relief upon the ground of mistake, before he can claim the assistance of the Court".⁶⁹ He decided that payment in \$U.S. had been intended. If the case was being decided on the basis of estoppel, it ought to have been shown that the defendant was misled to his prejudice by the subsequent conduct of the plaintiff in paying \$U.S. But knowledge of the bargain, namely the written contract, was available to both parties.⁷⁰ So the decision was presumably intended to be based on the principle of the *Pearson* case, which is available if the written contract is ambiguous,⁷¹ although the actings of the parties cannot be used to contradict the written contract.⁷² The judgment seems to suggest that there was an onus on the plaintiff to prove that his subsequent conduct in paying in \$U.S. was due to a reasonable mistake, and it is not explained how such an onus could arise.

Another common-law principle of construction, also depending on the existence of an ambiguity in the written contract, was mentioned by Lord Russell in *Feist v. Société Intercommunale Belge d'Electricité*,⁷³ where he said that if "upon a consideration of the contractual provisions, those provisions are open to more than one construction, descriptive words appearing elsewhere in the document may well assist in deciding which of the alternative constructions represents the intention of the parties; indeed they may be decisive; but if the contractual provisions reveal only one construction, outside descriptive words will not be competent to alter that

⁶⁹ P. 197.

⁷⁰ Cf. *Square v. Square and Cowan v. Cowan*, [1935] P. 120.

⁷¹ *N. E. Railway Company v. Hastings*, [1900] A.C. 260, at 270.

⁷² Cf. *Myers v. Union Natural Gas Company* (1922), 53 O.L.R. 88.

⁷³ [1934] A.C. 161, at p. 168.

construction. If they cannot be reconciled with it they become mis-descriptive." The question was whether the meaning of the contract was payment of the nominal amount in sterling or payment in sterling calculated on the nominal amount in gold. The contractual provisions proper were such that the first interpretation would have implied that the gold clause was empty of content. However, there were also certain descriptive words in note form on the document. Lord Russell appears to have taken the view that the contractual provisions were not really open to more than one interpretation so as to let in the rule of construction just quoted.

There are various cases in which an obligation is expressed in dollars or in pounds for example, without specifying clearly or at all what kind of dollars or what kind of pounds. A number of such cases involving an ambiguity between United States and Canadian dollars were decided in the early 1920's.⁷⁴

In *Simms v. Cherrenkoff*,⁷⁵ there was an agreement for the sale of land in Saskatchewan. The plaintiff executed the agreement in the United States and the defendant in Canada. Instalments of purchase price and interest were "payable at the Northern Trust Company, Chicago, U.S.A." The question was whether payment should be in United States dollars, the latter then being at a substantial discount. There was no express determination of the proper law and the court decided that "the payment must be made in the currency where the money is payable . . .".⁷⁶

The case of *Weiss v. The State Life Insurance Company*⁷⁷ concerned policies issued on the life of an Ontario resident by a company with headquarters in the United States but registered in Ontario. The policies provided for payment of a sum assured in "dollars" at the "home" office of the company in Indiana. The premiums were to be paid "at said Home Office or to any agent of the company". The premiums were in fact paid in Canada. On the death of the insured, however, his representatives claimed payment in \$ U.S. (which then stood at a premium). The view of the majority of the Supreme Court of Canada was that the insurance law of Ontario

⁷⁴ The year 1920 saw the collapse of the boom after the first world war and a "sharp depression with severe unemployment reached its bottom in 1922": Jamieson, *Chartered Banking in Canada* (1953) pp. 51-52.

⁷⁵ (1921), 62 D.L.R. 703.

⁷⁶ Mann suggests that if the transaction relates to immovables, "it will often be safe to assume that the parties intended to adopt the money of the country where the property is situated" as the money of account, *ante* footnote 1, p. 187. But see also *Ehmka v. Border Cities Improvement Company* (1922), 52 O.L.R. 193, discussed *ante*. However, both the *Simms* case and the *Ehmka* case are not too satisfactory.

⁷⁷ [1935] S.C.R. 461.

was a relevant factor in the interpretation of the ambiguous term "dollars". By the Ontario Insurance Act⁷⁸ payment was required to be made in "lawful money of Canada", the provision to have effect notwithstanding any agreement to the contrary. According to the Ontario act (at the relevant times) an insurance policy delivered in Ontario to an Ontario resident "shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof . . .". Cannon J. considered that "any inference in favour of American dollars" to be drawn from the fact that the place of payment was in the United States was rebutted by the provision of the Ontario Insurance Act and by "the interpretation which has been put upon the ambiguous contract by the acts of the parties".⁷⁹ In the opinion of Crocket J. and Dysart J., Ontario law was the proper law of the contract because the company was registered in Ontario and the insured was an Ontario resident, so it could be assumed "that both contracting parties realized that they were making a contract in Ontario; and that if they adverted at all to the meaning of the term 'dollars' as used in the policies, they intended to comply with the laws of the Province in that regard". Consequently the view of the majority was that Ontario law was the proper law of the contract and that the domestic presumption that the money of account is the currency of the place of payment was rebutted by reason of the Insurance Act and the conduct of the parties. The argument of Duff C.J. and Davis J., dissenting, was that there was nothing in the terms of the contract itself to displace the presumption in favour of the currency of the place of payment. As for the Insurance Act, the relevant section was only intended to determine the money of payment and not the money of account. It is submitted that the reasoning of the minority is preferable.

In *Brown v. Alberta Railways*,⁸⁰ a Canadian bond contained a promise to repay the principal in "lawful money of Canada at the Counting House of J. S. Morgan & Company, in the City of London, in England . . .". It was also provided that, as to principle and interest, the bond should "be payable there at the fixed rate of exchange of \$4.86½ for the pound sterling". There was also stated in the margin a rate "\$25 or £5:2:9". The court held that the fixed exchange rate was an integral part of the contract and meant that a holder of such a bond was entitled to receive £5:2:9 or its current equivalent in Canadian dollars. In the case of bonds payable in Canada, the holder would be entitled to repayment of twenty-five

⁷⁸ R.S.O., 1914, c. 183, s. 155(1).

⁷⁹ P. 477.

⁸⁰ (1921), 59 D.L.R. 520.

Canadian dollars. The intention was to encourage investors in Great Britain by providing that they could obtain repayment of the exact sterling sum they had lent.

VII. *Sale of Goods*

*Bain v. Field*⁸¹ was a case where goods located in New York were sold f.o.b. New York. The seller's place of business was in Winnipeg, and the purchasers were in England. An action for breach of contract on ground of non-acceptance of the goods was raised in England. After the breach, great difficulty had been experienced in disposing of the goods on the New York market, but Bailhache J. thought that the plaintiff "if he had liked to have taken three dollars [a case] he could have obtained three dollars about the time of the breach. That seems to me to be the measure of his damages."⁸² Bailhache J. took the money of account as \$ U.S. and calculated the damages as the difference between the contract price of 3,200 cases at \$5.25 U.S. a case and 3,200 cases at \$3 U.S. a case, which amounts to \$7,200 U.S.

The Court of Appeal held that Canadian dollars had been intended as the money of account, and Bankes L.J. said that it seemed to him "upon the facts that what the parties were contracting in were Canadian dollars. The seller lived in Winnipeg and the buyers were in London. The price was quoted in London and, in the absence of very strong evidence to the contrary, I assume that the seller was quoting a price in the currency of his own country."

The Court of Appeal seems to have taken \$7,200 Can., converted into sterling, as the measure of damages. By the Sale of Goods Act, however, the measure of damages for non-acceptance is, *prima facie*, the difference between the contract price and the market price at the time of non-acceptance.⁸³ The basis of damages for breach of contract is fair compensation for loss sustained, subject to the general principle that a party ought to do what he reasonably can to mitigate his loss.⁸⁴ The normal way in which loss can be mitigated in the case of non-acceptance is by resale of the goods by the seller. The reason for the rule in the Sale of Goods Act is indicated in *Bar-*

⁸¹ (1920), 3 Ll. L. Rep. 26, 5 Ll. L. Rep. 16, at p. 17. Cf. *Booth & Company v. Canadian Government Merchant Marine* (1933), 63 F. 2d 240, in relation to a bill of lading. See Mann, *ante* footnote 1, pp. 206-207; Dicey (6th ed.) pp. 737-739.

⁸² 3 Ll. L. Rep. at p. 29.

⁸³ Cf. R.S.O., 1950, c. 345, s. 48: section 50 of the English act; *Campbell Mostyn (Provisions) v. Barnett*, *The Times Newspaper*, Feb. 10th, 1954.

⁸⁴ (1954), 32 Can. Bar Rev. 577; *A.K.A.S. Jamal v. Moolla Dawood Sons & Company*, [1916] A.C. 175.

row v. Arnaud,⁸⁵ where it is said to exist "because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them." Applying these principles to the situation where the goods are in one jurisdiction and the seller in another, one would think that the sum to be taken as mitigation of loss would be the market price at the locus of the goods measured in the currency of that place and converted into the currency of the forum.⁸⁶ To obtain the damages, this result would then have to be deducted from the contract price, also converted into the currency of the forum. But in *Bain v. Field*, the difference between the contract price and the mitigation was taken in \$ Can. of the same nominal amount as the calculation of *Bailhache J.* in \$ U.S., and the amount in \$ Can. was converted into money of the forum. In regard to the parallel question of damages for non-delivery, Scrutton L.J. said in *Di Ferdinando v. Simon, Smits & Company*⁸⁷ that when "a plaintiff claims damages for breach of contract to deliver goods in a foreign country at a fixed date, the meas-

⁸⁵ (1846), 8 Q.B. 604, at pp. 609-610.

⁸⁶ It is a principle of English law that the courts "have no jurisdiction to order payment of money" except in the currency of the forum: *Manners v. Pearson*, [1898] 1 Ch. 581, at p. 587. For criticism of this rule, see Mann, *ante* footnote 1, p. 316. See also *Heisler v. Anglo-Dal*, [1954] 2 All E.R. 770, at p. 774. Conversion of a sum of foreign money into currency of the forum is made in accordance with the "breach-date" rule: *The Volturmo*, [1921] 2 A.C. 544 (in this case, however, the date actually taken was that on which the damage arose, which was not the same as the breach-date, but the case appears to have become a leading authority for the breach-date rule); *Di Ferdinando v. Simon, Smits and Company*, [1920] 3 K.B. 409; *The "Canadian Transport"* (1932), 43 Ll. L. Rep. 409; *Livesley v. Clemens Horst Company*, [1924] S.C.R. 605; *Stoyanoff v. Dimitroff* (1920), 18 O.W.N. 421; *Hooton Cocoa Company v. Willards Chocolates* (1922), 21 O.W.N. 358; *Montreal Tramways Company v. Savignac* (1923), 34 B.R. 245 (Que.); *Ottoman Bank v. Chakarian*, [1930] A.C. 277; *Cummings v. London Bullion Company*, [1952] 1 K.B. 327, [1952] 1 All E.R. 385, (1952), 68 L.Q. Rev. 163, 15 Mod. L. Rev. 369. In *Quartier v. Farah* (1921), 64 D.L.R. 37, however, an advocate in France sued in Ontario for a sum in francs in respect of fees for taking evidence on commission. Payment was first requested in 1913. Conversion was made at the date of judgment (in 1920). The amount was treated as being neither damages for breach of contract nor money payable at a fixed time and place (p. 49). Perhaps the case turned on these special facts, but nevertheless the dissenting judgment of Magee J.A. seems more persuasive than that of the majority. As to American law, see (1954), 3 Amer. J. of Comp. L. 155. In *Tillman v. Russo-Asiatic Bank* (1931), 285 U.S. 539, the action was on a debt due abroad payable in foreign currency. The majority of the court considered that, as the debt was resting owing in the United States at the date of judgment, the measure was \$ U.S. on that date. Cf. *Deutsche Bank v. Humphrey* (1926), 272 U.S. 517. See also *Dennison* (1932), 10 Can. Bar Rev. 134, and (1935), 35 Col. L. Rev. 360. See also (1956), 5 Amer. J. of Comp. L. 248 (comment on recognition and review of foreign money judgments in France).

⁸⁷ [1920] 3 K.B. 409, at p. 414.

ure of damages is, if there is a market, the market value of those goods at the place where and on the day when they should have been delivered".⁸⁸ It is at the place of delivery that the purchaser will normally buy other goods on the market to mitigate his loss, and so the amount of the mitigation should be the amount required to be spent in that connection in the money of the place of delivery, converted into the money of the forum.

Theoretically, there are thus three possibilities: (a) the currency in which the price is expressed, (b) the currency of the place where purchase of other goods in mitigation would normally be made, that is, in general, the place of delivery or acceptance, (c) the measurement of the contract price in the currency in which the parties intended it to be expressed and the measurement of the mitigation in the currency of the place of mitigation, both these quantities then being converted into the money of the forum and the difference taken, in order to arrive at the damages payable. It is submitted that the third possibility is the most logical.⁸⁹

VIII. *Ambiguities in Regard to Sterling*

Ambiguities may also arise in the interpretation of the word "pound", for example, whether contracting parties meant the obligation to be measured in pounds sterling or in Australian pounds or in New Zealand pounds. The solution of these problems usually involves, *inter alia*, a consideration of whether at the relevant times Australia, for example, had a different currency from sterling. It is not proposed to discuss these questions here, or the case law and literature on the meaning of the "pound" in such obligations.⁹⁰

⁸⁸ See Dicey (6th ed.) p. 738; Mann *ante* footnote 1, pp. 207 *et seq.*

⁸⁹ *Bain v. Field* is a rather unsatisfactory case and in the *Di Ferdinando* case, where the question was one of conversion of goods by a carrier, there were only two possible currencies, Italian and English.

⁹⁰ *Adelaide Electric Supply Company v. Commonwealth of Australia*, [1934] A.C. 122; *Auckland Corporation v. Alliance Assurance Company*, [1937] A.C. 587; *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society*, [1938] A.C. 224; *Bonython v. Commonwealth of Australia*, [1951] A.C. 202; *De Bueger v. Ballantyne & Company*, [1938] A.C. 452; *National Bank of Australasia v. Scottish Union & National Insurance Company*, [1952] A.C. 493; *Roberts v. Victorian Railways Commissioners*, [1953] V.L.R. 383; *Goldsbrough Mort & Company v. Hall* (1949), 78 C.L.R. 1; *Maudsley v. Colonial Mutual Life Assurance Society*, [1945] V.L.R. 161; *National Mutual Life Association of Australasia v. Attorney-General of New Zealand*, [1956] 2 W.L.R. 532; *Ottoman Bank of Nicosia v. Dascalopoulos*, [1934] A.C. 354. Cf. *Marrache v. Ashton*, [1943] A.C. 311; Mann, *ante* footnote 1, Part II; Dicey (6th ed.) pp. 734-739; (1952), 68 L.Q. Rev. 195; (1953), 6 Vand. L. Rev. 505. As to "francs" see, for example, *Levy v. Cleveland C.C. & St. L.R.R. Co.* (1924), 206 N.Y.S. 261. See also (1956), 72 L.Q. Rev. 161; (1956), 32 N.Z.L.J. 246, at p. 267.

IX. *Trust Funds and Legacies*

Currency questions may arise in relation to the distribution of trust funds, payment of legacies and similar matters. The case of *Chesterman's Trusts*⁹¹ arose out of the distribution of a trust fund on the death of a life tenant. The court ordered an inquiry whether any of the beneficiaries had encumbered their shares and the Master, by certificate, determined that certain beneficiaries had assigned their shares as security for debts owed in German reichsmarks. The Master was then required to apportion the mortgage security and for this purpose it was necessary to convert into sterling the amounts found due in reichsmarks and to determine the proper date at which the conversion should be made. The fundamental question was "how much of the fund representing the mortgaged property is to be paid to the mortgagee in order to entitle the mortgagor to redeem".⁹² If the mortgagor had tendered the redemption sum in marks at the date of the Master's certificate, the sterling price of that quantity of marks would have been determined by the exchange rate on that day. Warrington L.J. and Lord Sterndale M.R. considered, therefore, that the date of the Master's certificate was the correct conversion date. Younger L.J., however, in a dissenting judgment, favoured the due dates under the mortgages.

In *Montreal Trust Company v. Abitibi Power & Paper Company*,⁹³ the liquidator of bonds secured by a mortgage granted by the defendant company claimed sale or foreclosure and an account of what was due to the plaintiff and other bondholders. The bonds were "payable, at the option of the holder, in United States funds, upon presentation at certain named places in the United States of America".⁹⁴ A question arose as to what conversion date should be employed by the Master in taking the account. The court followed the principle of *Chesterman's Trust*, namely, that in making a division of funds the court ascertains what sum would be payable to the mortgagor if it were then seeking to redeem, and the date of conversion is the date of the Master's certificate.⁹⁵

A conversion problem may also arise with regard to a legacy. In *Re Eighmie*,⁹⁶ a testator, who died domiciled in England, left a legacy to a legatee in England of \$10,000 U.S. "or the equivalent thereof in sterling at current rates of exchange". It was held that, to pre-

⁹¹ *In Re Chesterman's Trusts*, [1923] 2 Ch. 466.

⁹² *Per* Warrington L.J. at p. 485.

⁹³ [1944] O.R. 515.

⁹⁴ *Per* Kellock J.A. at p. 523.

⁹⁵ At page 524. *Sed aliter* if a personal judgment is sought when the conversion date should be related to the maturity dates of the bonds: *The Custodian v. Blucher*, [1927] S.C.R. 420.

⁹⁶ [1935] 1 Ch. 524.

serve equality with the other legatees, conversion should be made as at one year from death (when the legacies would become payable by the executor). Eve J. agreed with the argument of counsel for the residuary legatees that the legacies should be treated "just like any other general legacy of stocks or shares, and the value must be determined as at the date when it becomes due, i.e., at one year from the death of the testatrix". In an American case⁹⁷ there was a legacy of German marks by a testator domiciled in the United States to legatees resident in Germany. The legacy was regarded as a bequest of a commodity and, there being insufficient German marks in the testator's estate, the legatee had to be provided with funds to enable him to purchase the specified quantity of German marks.⁹⁸ Post-war, the German mark was in a state of considerable flux and the court decided that the testator had intended the legacy to be measured in whatever passed as a German mark in the market at the date of his death.⁹⁹ The German mark as at the date of death was, therefore, regarded as the money of account of the legacy. In the American case, the legatees were entitled simply to receive the quantity of marks specified in the will, and the executor had to buy marks with dollars to make up the amount of marks bequeathed. There was thus no difficulty about the date of conversion. But in the *Eighmie* case the legatee was left dollars or the equivalent in sterling at current rates of exchange. The executor might be required, therefore, to purchase sterling so as to give the legatee the equivalent of the legacy expressed in dollars. Consequently, in the English case, a date of conversion was involved, and it seems reasonable to take this date as the time of distribution of the estate.¹⁰⁰

⁹⁷ *In re Lendles' Estate* (1929), 166 N.E. 182.

⁹⁸ *Per Pound J.* at pp. 182-183: "The bequests were of German marks which are to be regarded, not as a measure of value, but as a commodity. They are like a general bequest of stock or bonds, to be satisfied in kind. At the time of making the will the testator intended that the legacies should be paid in marks when he died. . . . The will contains no intimation that when testator gave general legacies of marks he intended to give legacies payable in dollars at the prevailing rate of exchange, either at the time he made the will or at the time of his death." In *Re Willing's Estate* (1928), 140 A. 558, 292 Pa. 51, there was a bequest in a will of a number of francs payable in \$ U.S. according to a gold franc in being at the time the will was made. Although the gold franc was replaced by a fluctuating paper franc, it was held that the gold franc was still the measure of the legacy, since the court found an intention to devote some stable and fixed sum for the benefit of those named as beneficiaries.

⁹⁹ See criticism of the case on this point, Mann, *ante* footnote 1, pp. 248-249.

¹⁰⁰ These two cases are discussed in Mann, *ante* footnote 1, p. 287, and the criticism of the *Eighmie* case is difficult to follow. It is said that the decision fails to deal with the question of whether "there was any right or any necessity to convert the dollar sum into pounds sterling . . .", but according to the statement of facts in the report (at pp. 524-525) the legacy was for dollars or the sterling equivalent at current exchange rates.

X. Conclusion

The present writer is with those who advocate that the court should not be bound in by rules and presumptions in determining the proper law of a contract. An element of certainty can no doubt be obtained by setting up a rule or formula from which a solution will follow more or less definitely. But the primary objective is justice. Certainty in the law should arise naturally, when principles of law are accepted generally because of their fairness and logic; it should not be created artificially for its own sake.

According to what general technique, then, should a court approach the interpretation of a foreign money obligation? First, the proper law must be determined and, of course, effect must be given to any explicit term in the contract regarding the proper law. Secondly, if there is no explicit term, the court must consider whether there is anything in the contract, or in the whole circumstances surrounding it, giving rise to a reasonable implication that the parties had meant the interpretation to be governed by a particular system of law. Thirdly, where there is nothing to indicate any selection of law by the parties, the court must select a system of law, and should select that system which it seems most fair and logical to apply in the interpretation, having regard to the nature of the contract and its whole surrounding circumstances. The weighing of the factors and circumstances should be related to the facts of the particular case, rather than to rules or presumptions in favour of the *locus contractus* or the *locus solutionis*. The *locus contractus* and the *locus solutionis* should be given their logical weight, but due regard should also be given to other possibilities, such as the law of the domicile (or in some cases perhaps the residence) of a party as tending to a uniform interpretation among bondholders in an international issue. After it has determined the proper law (or where it has determined that the relevant municipal rules are the same in all the possible selections of proper law), the court applies the municipal rules of the selected system to interpret the obligation. The construction of documents and the analysis of surrounding circumstances may be involved both in the conflicts problem of determining the proper law and in the problem of applying the domestic rules of interpretation of the selected law, for the court may have to analyse the documents and circumstances in relation to the conflicts problem and then have to re-analyse them from the angle of interpreting the foreign money obligation according to the domestic rules of the proper law. Indeed it is only by following out a systematic scheme of analysis such as the foregoing that courts can solve with safety these

complex and difficult problems of interpretation; and, in reading the cases, one receives the impression that too often, in this field of law, the courts tend to grasp at rules and maxims, instead of employing a clearly defined, logical method of solution.
