CHOICE OF LAW

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Introduction

Choice of law, by the prevailing theory, is a means of "shunting" a problem into one out of many systems of law. The starting point is that there are N systems, and a legal issue has arisen in a country which has jurisdiction to deal with it. The function of the choice of law rules of the forum is to reduce the number of possible solutions from N to one.[1] On a strict formulation of this theory, no special weight is given to the *lex fori*—it is not favoured as against the law of Ruritania.[2] These ideas have an aura of internationalism, but choice of law rules are part of the total law of a given country and are limited by its boundaries as to enforceability.[3] The choice of law rules of a particular country may be motivated by "international" ideas and by principles deemed necessary and desirable for the social existence of countries *inter se*.[4]

In the severer forms of "shunting" theory, the comparative justice of the N possible solutions is not relevant. Therefore, the

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[1] The view of Batiffol, Aspects philosophiques du droit international privé, (1956), is that the purpose of conflict of laws should be to promote co-ordination between legal systems, so as to minimise the inconveniences and injustices which stem from the multiple-system world in which we live. *Cf.* Batiffol, Traité élémentaire de droit international privé (3rd ed., 1959), p. 3. In the first edition of his treatise, Westlake defined private international law as "that department of private jurisprudence which determines before the courts of what nation each suit should be brought, and by the law of what nation it should be decided". Private International Law (1858), p. 1.

[2] According to Wolff, Private International Law (2nd. ed., 1950), p. 24, Bartolus was not concerned with what system of law applied to a set of facts, but what sets of relationships fell under a given rule of law, and he developed his theories on that footing.

[3] The theory of this is discussed by Tomaso Perassi, Lezioni di Diritto Internazionale (1962), vol. II, Ch. 3, s. 27, on the basis that the word "international" in this context denotes a classification of rules of internal law.

[4] An important historical factor has been the doctrine of comity—for example, the principle of Huber: "*Rectores imperium id comiter agunt, ut iura cuiusque populi intra terminos eius exercita teneant ubique suam vim, quatenus nihil potestati aut iuri alterius imperantis eiusque civium praeiudicetur.*"

decision is developed in three stages. The first is where any of N systems may apply to the problem, and where these are regarded as equally just. The next stage is to apply the "shunting" rules of the forum, to bring the problem uniquely into one legal system. These "shunting" rules are of a general character. The court is not supposed to look at what would be the solution if system l_1 were applied and what it would be if l_2 were applied, and then decide which would be the fairer and more reasonable disposal of the issue. The "shunting" rules are isolated from the justice of the end-result, and so there are two sets of laws in each forum, (a) choice of law or "shunting" rules, and (b) other laws of the system, sometimes described as "internal" or "domestic".

According to Falconbridge,[5] the "subject of the conflict rule is a legal question or problem arising from the factual situation or from some element or elements of that situation". The rule is composed of three parts: (a) the kind of legal question, for instance capacity to marry, transfer of things *inter vivos*; (b) a "connecting factor" or "particular local element in the factual situation (domicile of a person at a particular time, the place of the doing of an act, the situs of a thing, or as the case may be)", this being "the factor which connects the factual situation with a particular country"; (c) the conclusion that the law of that country should be applied.[6]

I. *The "Formal Conditions" of "Shunting".*

Let us examine the operation of "shunting". Its purpose is to associate a legal issue with one system of law. Suppose that the problem is whether a ceremony of marriage between H and W was valid. The class of legal question is—the formal validity of marriages. If the conflict rules of the forum connect this class and the law of the *locus celebrationis*, the problem is uniquely solved. Whether the final disposal by this law is a model of enlightened justice or oppressive and unfair, is not a relevant factor, (unless the solution is such as to offend the public policy of the forum,[7]

[5] Conflict of Laws (2nd ed., 1954), pp. 39-40. See generally pp. 37-49 on the structure of a conflict rule.

[6] *Ibid. Cf.* Rabel, The Conflict of Laws, vol. I, (1945), pp. 42-43. For a comparative discussion see Goldschmidt, Derecho Internacional Privado (1952), vol. I, s. 15 ("Los puntos de connexión") where it is said p. 317 that "Estos puntos de contacto funcionan como 'variables' en las Matemáticas que, según los casos, pueden revestir cualquier valor".

[7] One may compare the case of *Kenward* v. *Kenward*, [1951] P. 124, where a marriage in the U.S.S.R. was held invalid because the celebrant had omitted certain formalities (presumably without the knowledge of the parties) and *Alspector* v. *Alspector*, [1957] O.R. 14 and 454 where no marriage licence was obtained, but the marriage was upheld because the

and in the common-law jurisdictions, at least, public policy does not often function explicitly).[8]

We can generalise the foregoing. The first operation is to construct a class of issues s_X. If every s_X had its own connecting factor, the number of these would become unmanageable. So classes are formed on the basis that x will have many possible values, but the number of classes will be small. The next step is to find a link between a connecting factor and a legal system. Formally, anything will do as a connecting factor which is capable of reducing to one, the choice among the N systems. Any factor which cannot do this is ineffective by itself. So the necessary and sufficient characteristics of a connecting factor from the formal point of view, are (i) that it be associated with each legal question within the class, and (ii) that it be linked with only one of the jurisdictions. These conditions will be referred to as the "formal conditions". In the example of the validity of a marriage ceremony, the requirements are satisfied by the *locus celebrationis*—it is part of the fact situation, and it will have a geographical position exclusively in one jurisdiction. The forum will satisfy the formal conditions, because the place where the action is raised is a fact associated with the legal question, and the forum is unique. The same issue can be raised in any forum which has jurisdiction by its local law, and in this sense the forum chosen has a different kind of "fixity" from something like the *locus celebrationis*. The formal conditions will be satisfied, *inter alia*, by *any* fact able to be associated with each element of the class s_X and having a geographical location wholly within one of the legal systems.

II. "*Real*" *and* "*Personal*" *Connecting Factors.*

For historical reasons, the main types of connecting factor are of a "real" or a "personal" nature.[9] The idea is that the legal question is to be associated either with a *res* to which a geographical location can be assigned or else with some characteristic of a party to the dispute. A "real" connecting factor usually satisfies the formal conditions—for instance the *locus celebrationis* of a marriage or the situs of land or a chattel. Most connecting factors are not pure facts, and so the determination of a problem by a "real" connecting factor is not so simple as might be thought

parties intended to be validly married. See Baxter, The Law of Domestic Relations 1948-1958 (1958), 36 Can. Bar Rev. 299, at pp. 300, 304.

[8] See Baxter, Recognition of Status in Family Law (1961), 39 Can. Bar Rev. 301, at pp. 307-311 as to public policy and "ordre public".

[9] *Cf.* Yntema, The Objectives of Private International Law (1957), 35 Can. Bar Rev. 721.

prima facie. When we turn to the "personal" connecting factors, for instance nationality, domicile, the situation is different. A "personal" connecting factor does not, in general, satisfy the formal conditions, at least, not in such a direct manner as in the case of "real" factors. Disputes involve more than one person. A "personal" connecting factor only relates to one individual. Suppose that the conflict rule of the forum is that capacity to contract shall be determined by the law of the nationality. Unless the nationalities are all the same, a supplementary rule will be needed when the nationalities differ. This rule might be that the contract will only be valid as to capacity when each party has capacity by his national law. This would mean that the forum might find a contract invalid by reason of an incapacity pertaining to A by the law of his nationality, although the same ground would not affect the validity of the contract by the local law of the other nationalities or the forum. Another possible supplementary rule is that the contract will be valid as to capacity, if valid by the local law of at least one of the parties. In general, the "personal" type of connecting factor relates the legal question with a characteristic of an individual which determines his personal law, this law being applied by the forum to govern certain aspects of his life. In some situations, for instance in distributing the movables of an intestate —the formal conditions are satisfied, subject to determination by the forum of what is the personal law.[10] The idea of a man carrying his own law about with him—like his religion, clothes and personal luggage—has had great influence. Legal issues, however, are not normally unilateral problems.

The connecting factor must be something that will pertain to every member of the class s_x. This may be referred to as the "universality" of the connecting factor. Also the connecting factor must possess "uniqueness"—it must channel the issue to one system of law. The personal law has universality but not always uniqueness.

III. *Analysis of the Formal Conditions: Choice of Law Schemes. Scheme one*

One way of setting up a choice of law rule is as follows: let f represent a potential connecting factor. This factor is chosen so

[10] Nationality and domicile can be difficult concepts, and their meaning may vary substantially from one jurisdiction to another. See Baxter, *op. cit.*, footnote 8, at pp. 303-307. Also whereas nationality applies to a country, conflicts problems may arise between states or provinces (in the case of a federation) and the formal conditions will not be satisfied without supplementary rules.

as to be common to all legal questions of the class s_x. The uniqueness requirement is satisfied if f leads to one only of the N systems.

Scheme two

There are other ways of setting up a choice of law rule. The N systems can be arranged in alphabetical order and each court of the forum (as from a certain point of time) can allocate the first cause in time which comes before it to the first system (in the alphabetical order) and so on.[11] The essence of this choice of law process is that an order is determined for both the systems and the legal questions, and they are co-ordinated with each other.

These relations are patterns for choice of law rules which satisfy the formal conditions. There is no obvious argument *a priori* against either, since all the N systems (including the forum) are regarded, at this stage, as equally capable of producing a fair and workable solution. The first functions by means of a specially constructed, intermediate, *general* class, lying between the *particular* legal question in issue and the *particular* system which is to govern it; the second is an operational connection between the set of questions and the set of systems.

Scheme three

A choice of law rule whereby a dispute between parties with different personal laws is referred to a supplementary, "federal" system, might return to fashion with a development of federalism and supra-national regionalism, such as in the case of the European Communities. It can only operate, of course, where there is some concurrent jurisdiction of legal systems. Choice of law rules of this type require a connecting factor which is a general characteristic possessed by all persons, for instance domicile in the case of physical persons and something equivalent in the case of legal persons. The form of these rules is, therefore, different from those already mentioned, in that they connect disputing parties and systems. The formal conditions do not hold where the issue is bilateral or multilateral, and the operation of the connecting characteristic leads to different jurisdictions. The third system is logically effective only if the supplementary legal system exists concurrently with each of the s_x.

[11] *Cf.* Currie Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws (1961), 28 U. of Chi. L. Rev., at pp. 258, 271. This would result in a high proportion of domestic problems being allocated to foreign law, but for the present we are considering the choice of law operation as a formal "shunting" exercise on the basis that all the systems, *prima facie*, can produce an equally just and reasonable final solution.

Scheme four

There has been a tendency to develop a "shunting" system by designating preferred jurisdictions for certain kinds of legal question. According to this plan, the forum accepts the view of the preferred jurisdiction for the issue involved, without regard to what system of law that jurisdiction has applied or would apply. This theory has been developed in English law, where for instance in the matter of recognition of foreign divorce judgments preference has been given to decisions by the courts of the husband's domicile.[12] It is similar to the first theory except that the association is with a jurisdiction rather than a system of law.

It is obvious from the foregoing that if different countries use different "shunting" rules (in addition to defining connecting factors and other relevant concepts in different ways) there can be a great deal of complexity and variation in the working out of conflict problems. These differences do exist and there is not uniformity even as to the formal structure of the rules. There is, however, a preference for the first and the fourth schemes. If we were devising a conflict of laws system *de novo*, in a highly developed country with electronic computers and fast communications, there might be an argument for the second scheme. For the third scheme, the condition is that a supplementary system of law, L, exists concurrently with the set of individual systems, and in practice this will be fulfilled only regionally or federally. Also, there will be extra-regional or extra-federal problems as to which scheme three will be ineffective because L does not operate externally, and so if three is used there will be two theories, one for regional or federal problems and another for external problems.[13] In comparing schemes one and four, we must distinguish between the position where a foreign court has and has not made a judgment on the issue. If a judgment has been made so that the problem is one of recognition, four can be applied on the basis that the forum will recognize a judgment by the preferred jurisdiction, but not a judgment by another jurisdiction.[14] If a judgment has not been given, then a reference to a certain jurisdiction must be to the law of that jurisdiction (perhaps including its conflicts rules).[15]

[12] See Baxter, *op. cit.*, footnote 8, at pp. 323-328.

[13] Scheme three is to be distinguished from the situation where some of the laws to which a person is subject are federal and some are state or provincial. In this situation it is the content of the issue which determines which type of law will apply and not whether the parties have the same domicile or some individual characteristic such as that.

[14] This is the approach of the common-law countries in regard to divorce and possibly nullity.

[15] The question whether a reference to the law of a country means a

Therefore, apart from recognition problems, one and four are hard to distinguish. Formula one will work for recognition as well as for other conflict questions, the usual basis being that the forum will recognize a judgment of a foreign court if it has applied that law which, by the choice of law rules of the forum, would be applied to the issue.[16] There would seem to be an advantage, from the point of view of simplicity, in using formula one for both recognition and other conflict problems. Formula four means that two different concepts of jurisdiction exist in the total law of the forum, (a) local jurisdiction, (or whether a court of the forum has power to try a particular case) and (b) a conflict of laws jurisdiction as envisaged by the formula. This concept may be another source of complexity and confusion.

IV. *The Logical Structure.*

Using scheme one as typical for choice of law rules, what is the logical structure for the determination of a legal problem? Let us again take as an example, the formal validity of a marriage. The choice of law rule of the forum is that the ceremonial validity of a marriage is governed by the place of celebration. The chosen law requires the fulfilment of a set of conditions for ceremonial validity. The outline of the reasoning is:

(1.a) Ceremonial validity is governed by the law of the place of celebration.

(1.b) The particular marriage was celebrated in Ruritania.

(2.a) By the law of Ruritania, if conditions X are fulfilled, a marriage is valid as to ceremony.

(2.b) In the particular marriage, the conditions X are satisfied.

In (1) there is a selection to be made among N possible systems, whereas in (2) the choice is between valid and invalid.

Typical general characteristics of legal questions are (1) that parties can be regarded as connected with *somewhere*: (2) that something has been done, or has to be done, *somewhere*: (3) that a *res* is involved which is located *somewhere*: (4) that a forum has jurisdiction to decide the question. In traditional terms, these may lead to (1) *lex personalis*, (2) *lex actus*, (3) *lex rei sitae*, (4) *lex fori*. The connecting factor should belong to all the questions of the set, and should be capable, in one way or another, of geographical location within a single jurisdiction.

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reference only to its domestic or to its "total" law, that is domestic law plus conflicts rules may give rise to ambiguity.

[16] This is the practice in civil-law countries. *Cf.* Rabel, *op. cit.*, footnote 6, (2nd ed., 1958), vol. 1, p. 508 *et seq.*

V. *Can One Formally Effective Connecting Factor be Preferred to Another?*

There is no ground, from the point of view of formal structure for preferring one connecting factor to another, if each can transfer the issue effectively to one legal system. In this, there lies a major difficulty in the construction of choice of law rules by "shunting" approach. If choice of law rules only provide a means of allocating a question to a single system of law, various connecting factors may do this effectively. To prefer one of them, we must introduce other considerations not derived from formal structure. Where do we find these considerations; on what basis are they justified?

It is frequently said that these other considerations should not be obtained from an examination of the comparative justice of different end-results (although public policy may operate as an *ultimum remedium* and a special exception). This is equivalent to saying that all internal systems of law (as they bear on the question in issue) are equally just and efficient, and are treated as counters, with nothing about them to induce a preference. The argument is that if this attitude is not taken, the courts will be faced with the unmanageable task of examining the end-solutions in a variety of different systems of law and then choosing the one that appeals to them most from the point of view of reasonableness and fairness. If we are not to take these factors into account as they pertain to the end-solution, we must establish separate criteria of reason and justice for the choice of law rules *per se*. Reverting back to the outline of reasoning given above, this means that the considerations by which we seek to justify proposition (2.a) may be different from those by which we seek to justify proposition (1.a) although both justifications should depend upon principles of reason and fairness. In regard to (1.a) we seek to justify the principle, while ignoring the effect of the choice on the final disposal of the case, by the selected internal law. Is it possible to value connecting factors *inter se* and to prefer one of them under the conditions that the end-solution is ignored and that *a priori* all the legal systems are regarded as of equal weight and equally capable of doing justice? A law is designed to operate in a society, and its value and usefulness is normally assessed with regard to its impact on the lives and affairs of disputing parties and of the society in general, that is, on the basis of what kind of end-solutions are likely to be given because of it. A strict "shunting" approach to choice of law tends to produce rules which by

the principles on which they are constructed, exclude the possibility of evaluating the social consequences and justice of the end-solution. At the same time (as has been shown) conditions of formal, logical structure are not enough to solve the problem uniquely.

Suppose that the question is the validity of a contract for sale of goods. Various connecting factors could produce an effective "shunting"—for example (i) the nationality or the domicile of the seller or the buyer at some determinable time; (ii) the place where the contract was made; (iii) the place where the contract is to be performed; (iv) the location of the goods at some determinable time; (v) the location of the forum. If we limit ourselves to the time of the event and the time of the action, there are four possibilities under (i), one each under (ii), (iii) and (v), and two under (iv), a total of nine. There have been many ingenious arguments as to why one logically effective connecting factor should be preferred to another. For example, one factor may have achieved a greater degree of veneration for historical reasons (aided by the sanctity of a latin maxim); the legislature or courts of a jurisdiction may have favoured a certain factor—they had to favour something; legal scholars may argue that one factor is "more closely associated" with the question, or "more intellectually satisfying" than another; or it may be said that a man's affairs should be governed by the law of the place where he has made his home and established his household gods. All this has lead to a super-abundance of empty maxims; mystical arguments; idealistic "internationalism", "comity of nations"; and dogmatic repetitions—to bolster codes and judgments and to fill out the large texts which are popular in private international law.

VI. *An Alternative to "Shunting".*

There are reasons for the forum applying its own law,[17] for example: (a) a high proportion of the problems which come before the courts of a jurisdiction relate to fact situations within its boundaries; (b) in an even higher proportion of cases, there will be no practical or operational difficulty in disposing of the issue by its own law; (c) the judges and lawyers are trained in their own law, and only exceptionally in the law of any other juris-

[17] In earlier times, legal systems were not regarded as anchored to jurisdictions to the same extent as now. Some laws were associated with persons (with a consequent mobility), while others were connected with physical things (such as land). This was due to the great importance of personal status and of land as property in the Middle Ages and later.

diction; (d) if the *lex fori* is applied, the awkward matter of proving foreign law is avoided; (e) if the forum assumed jurisdiction (as it should) on the basis that it will not function in vain, the judgment can be implemented and enforced by the law of that country (together with any reciprocal foreign enforcement which may be possible). Suppose that A and B, both Utopians, have a car accident on a Utopian highway, and A sues B in a Utopian court. The people of Utopia (unless they are "shunting" addicts) will expect that such a situation should be dealt with by domestic law. It is rare, in practice, that a court of any country applies other than its own law. Point (b) is concerned with the efficiency, justice and proper functioning of a court system. If foreign law is applied, the court may have to decide its principles from expert evidence on alien concepts and usually with access to the sources only from translations. There is an "atomism" about applications of foreign law.[18] Some countries provide for a special inquiry into the foreign law,[19] but, in all cases, in both initial inquiry and facilities for appeal, investigation of foreign law inevitably falls short (in efficiency) of the application by the forum of its own law. In applying foreign law, the court operates in an area for which it is not really apt, either by organisation or by training. This is true whatever the method of establishing foreign law—whether it is treated as a quasi-fact or whether it is to be ascertained by the court from the study of authorities. There are tribunals which seem capable of administering different systems of law; for example, the Judicial Committee of the Privy Council, and the Supreme Court of Canada—or federal courts in the United States under the "Klaxon" doctrine. With the development of

[18] "Il est évident que les faits auxquels il s'agit d'appliquer la loi étrangère ne sont pas identiques dans les différentes espèces et que, d'autre part, en cas de rapports juridiques identiques, ce n'est pas toujours la même loi étrangère qu'il y a lieu d'appliquer. Dans ces conditions, la violation de la loi étrangère se présente en réalité sous forme d'erreurs isolées commises dans l'application d'une certaine loi étrangère aux faits d'une cause déterminée, et dont la portée se trouve en conséquence limitée aux parties à l'affaire en question. . . . il est permis de penser que, de même le manque de portée générale des cas d'application de la loi étrangère a contribué au refus de la Cour Suprême de contrôler l'interprétation de cette loi." Zajtay, La condition de la loi étrangère en droit international privé français (1958), p. 42.

[19] *Cf.* Code of Civil Procedure of the U.S.S.R., article 8: "In the event of difficulty in the application of foreign laws, the court may request the Ministry of Foreign Affairs to communicate with the respective foreign government for the purpose of obtaining an opinion on the question involved. Such opinion shall be transmitted to the court by the Ministry of Foreign Affairs." Gsovski, Soviet Civil Law (1949), vol. 2, p. 557. This article was carried over from the Code of Procedure before the revolution, Makarov, Précis de droit international prive d'après la législation et la doctrine russes (1933), pp. 100-101.

the European Communities, there may be more of this kind of thing. But these are all special cases, due to historical, political or similar reasons. Despite the adage of Stair that to become a "knowing lawyer" a man must ponder and digest in his mind the common law of the world, few can be good judges in more than one system of law (not to mention N systems), even with expert witnesses and modern libraries. The N-dextrous court is a myth.

VII. *Disadvantages of Dualistic Solutions.*

The means of carrying the judgment into effect are those over which the forum has control.[20] There is also a tendency to recognize foreign judgments as to status and title and to allow (indirect) reciprocal enforcement in some situations. A judgment given in terms of the law of J_Y may have to be enforced by the concepts and legal machinery of J_X, which may be different from those of J_Y. A court case is not a group of separate legal questions, but the settlement of a dispute. To resolve the dispute by partial reference to two systems of law, yields a dualistic solution and this *per se*, tends to inefficiency, doubt and awkwardness. There may be other considerations, but the determination of a whole case by a single system of law, and *a fortiori* by the *lex fori*, will probably be the most simple and efficient from the point of view of administration of justice.

VIII. *Exceptions to the Lex Fori.*

Should we advocate the *lex fori* for the solution of all legal problems? Consider the implications of a system whereby each of the N jurisdictions applies its own law and never foreign law. This method can provide effective solutions in a large number of cases. Are there situations where the method will produce solutions that are unacceptable for one reason or another? Unacceptability will not be due to the formal conditions, because a legal question can be allocated to a forum, which has a unique geographical location. In general terms, the disposition of a legal issue may be criticised (a) because it is inefficient or unreasonable in operation, as an element in the social machinery of the country; (b) because it is unfair as between the parties to the dispute; (c) because it is unde-

[20] Arrangements for reciprocal enforcement are an exception. In regard to judgments *in personam*, reciprocal enforcement is usually limited to final judgments for debt or a definite sum of money. One may consider in the same context Full Faith and Credit recognition of judgments in the United States of America. See Ehrenzweig, Treatise on the Conflict of Laws (1962), s. 47, p. 166.

sirable from the community point of view and in regard to public policy.[21] We seek unacceptability in these areas.

It is important to see the difference in principle between (a) a "shunting" approach, and (b) a process of determining in what areas the *lex fori* will give undesirable solutions. The root of the objection to (a) is that the conflict rules so produced tend to be a "transcendental body of law".[22]

In regard to the (b) attitude, it has been said that "once a court has taken jurisdiction, it will usually apply its own law, unless the parties' own choice or an important foreign fact, such as a foreign domicile, a foreign situs, or a foreign conduct, appear to require application of another law."[23] There is a tendency, by historical development of ideas, to say that certain elements such as foreign nationality or domicile, situs, conduct, *a priori* require application of the law related thereto.[24] The decisions of the courts in most countries, however, have shown an inclination to determine cases by their own law. This has frequently been achieved by the utilization of public policy, or by a biased interpretation of choice of law rules. It is understandable that a court should not wish to apply unfamiliar law, unless persuaded that there are very substantial reasons for not using the *lex fori*. If we treat the *lex fori* as the basic choice of law rule, we begin our investigation with one system—not with N systems—and it is then a main function of private international law to study exceptions to the *lex fori*. We will describe the body of law of a country, other than its conflict rules as the "standard" law of the jurisdiction. Sometimes

[21] For a discussion of these criteria and their manner of application, see Baxter, *op. cit.*, footnote 8, at pp. 348-350.

[22] Currie, Change of Venue and the Conflict of Laws: A Retractation (1960), 27 U. of Chi. L. Rev. 341. *Cf.* the statement at p. 343 that "This position assumes that it is possible to develop a rational system of conflict of laws in the abstract, independently of the policies and interests of the governments legitimately concerned, and independently of the construction and interpretation placed by the courts of a state upon its laws. This, I am now convinced, is an impossibility."

[23] Ehrenzweig, Basic Rule in the Conflict of Laws (1960), 58 Mich. L. Rev. 637. At p. 643 it is suggested that the *lex fori* should be taken as the basic choice of law determinant with "relegation of traditional conflict rules to the status of exceptions keyed to ever narrower fact situations . . .". The reason is that choice of law "formulas have in turn relegated both party autonomy and the basic *lex fori* to the status of exceptions, and have, in spite or rather because of their consistency and simplicity, brought this branch of the law to the brink of defeat". See also Ehrenzweig, Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation and Contracts in the Conflict of Laws (1959), 59 Col. L. Rev. 874 and 973, and a full discussion of the "rule of validation" in, *op. cit.*, footnote 20, s. 175 *et seq.* For a discussion of present applications of the *lex fori* in English law see Webb, Some Thoughts on the Place of English Law as *Lex Fori* in English Private International Law (1961), 10 Int. and Comp. L.Q. 818.

[24] Questions involving renvoi are purposely ignored.

the facts may be such as to induce a deviation from the standard law. The exertion of foreign influence is due to the policy of the *lex fori*. There may still be a choice of law problem under the "*lex fori*" approach, but it is not "transcendental". Whether (a) there should be a deviation from the standard law, and (b) with respect to which foreign system this deviation should occur, will usually coalesce into one question since the considerations which provide an affirmative answer to (a) will at least indicate (and will normally make it obvious) which foreign system should be preferred.

IX. *The Exception of Inadequacy.*

An example of a situation in which a court might find it irrational to apply its own law, is the celebration of a marriage.[25] H and W go through a ceremony of marriage in jurisdiction J_1 and an action for nullity is brought in J_2 on the ground that the marriage is invalid as to form. The rules of J_1 and J_2 will usually necessitate the carrying out of certain procedure.[26] They will not apply outside the jurisdiction. The court in J_2 should not ask whether H and W complied with the Marriage Act of J_2. There is a lacuna in the standard law of J_2, which requires a supplementary law. Since the ceremony took place in J_1, one expects the parties to have followed the law of J_1 (and this may be the only method permitted by the standard law of J_1). On the other hand, J_2 may require a special type of religious ceremony.[27] Assuming that this ceremony is one which may be correctly celebrated in J_1, it is then possible for J_2 to apply to the marriage in J_1 its confessional rule and there is no need for J_2 to do other than apply the *lex fori* in determining the formal validity of the marriage in J_1. Since, however, a state will include people of different religious faiths who cannot all be expected to marry by the same kind of religious ceremony, even if J_2 has a confessional law, it will not (in modern conditions) apply that law to all marriages, but only where H and W, or one of them, are of a certain religious faith. Thus it is a characteristic of laws on the formal validity of marriage that they

[25] For a comparative discussion of the validity of marriage in conflicts of laws in the common law and French law see Baxter, *op. cit.*, footnote 8, at p. 311.

[26] See Baxter, *op. cit.*, footnote 7, at p. 300.

[27] See *Chapelle* v. *Chapelle*, [1950] P. 134; Rigaux, La théorie des qualifications en droit international privé (1956), s. 262 on "lois confessionnelles"; Greek Civil Code, art. 1367; Spanish Civil Code, art. 42, Muñoz, Comentario, p. 104; *Cf.* Desjardins, Le mariage en Italie (1933), Ch. VI; T. de Tilière, Le mariage dans le Concordat Italien (1936), Ch. III; Makarov, *op. cit.*, footnote 19, p. 324 as to the confessional character of pre-revolutionary Russian marriage law.

are limited in their application to a certain geographical area or to a certain kind of person. Where the marriage in question lies outside these limitations, it is necessary for the forum to introduce rules for a marriage celebrated in a foreign country, or by a different religious faith. So, in questions of formal validity (depending on the structure of the law of the forum) there may be an exception to the *lex fori* in favour of the *lex loci actus*. This is an example of a general class of exception to the *lex fori*, caused by the inadequacy (or incompleteness) of the standard law of that system. Examples are: laws as to marriage formalities, execution of wills and documents, registration of securities such as mortgages in the common-law countries, formalities as to registration of title and change of ownership, court procedure, and so on.

All questions of formal validity, however, are not of this type. For example, the standard law of J_2 may prescribe that some document must be executed before two witnesses, or before an official of a kind existing in both J_1 and J_2, and so on. The formalities required by the law of J_2 could be carried out in J_1. So if the *lex loci actus* is now to be applied in J_2, it must be applied for some reason other than "inadequacy". The nature of a typical "other" policy reason may be seen by considering the situation where X and Y attempt to make a certain type of contract in J_1. Neither X nor Y may be a national or a domiciliary of J_2 (the forum) or even resident there. The conflicts rule of J_2 applies the *lex fori*, but X and Y, in good faith, make the contract according to the validity conditions of J_1. X and Y may have followed that law because they asked a local lawyer how to execute the contract and followed his opinion, and were unaware of the conflict rule of J_2. The parties intended to make a valid contract. Is it to be the policy of J_2 that the contract shall be invalid because X and Y have inadvertently observed the forms of J_1 instead of those of J_2? The preference may not be inadvertent. The parties, or at least one of them, may desire that the contract be formally valid in J_1. With these various considerations in view, J_2 may see fit to modify a strict rule of the *lex fori*, perhaps to the effect that there will be formal validity if either the *lex fori* or the law of some other system has been observed. For example: "As regards the formal validity of a will of 'personal estate' made by a British subject outside the United Kingdom, s. 1 of Lord Kingsdown's Act passed in 1861 by the Parliament of the United Kingdom, permits the use of the forms required by the law of the place of making or by the law of the domicile of the testator at the time

of making or by the law of the domicile of origin of the testator within the British dominions, and if the will is made within the United Kingdom, s. 2 of the statute permits the use of the forms required by the law of the place of making".[28] As to the general purpose of Lord Kingsdown's Act, Falconbridge says: "The object of the statute was to avoid having wills of 'personal estate' declared invalid, in point of form, in cases in which under the old law a testator had made a mistake in using the form prescribed by one law when he should have used the form prescribed by another law. The statute accordingly validated wills made in accordance with the forms prescribed by one of several laws, including the law of the place of making. . . ."[29] The French Civil Code permits the use of local forms, providing that a Frenchman "qui se trouvera en pays étranger, pourra faire ses dispositions testamentaires par acte sous signature privée, ainsi qu'il est prescrit en l'article 970 ou par acte authentique, avec les formes usitées dans le lieu où cet acte sera passé".[30] The question has been raised in French law and is somewhat in doubt, whether the application of the *lex loci actus* to questions of form is obligatory or merely permissive. As far as wills are concerned, the wording of article 999 is uncertain, but possibly the emphasis on the law of the place depends on the historical importance of this factor from the time of the Middle Ages both in regard to form and substance.[31] As regards the formal validity of a contract, English law allows the *lex loci actus* and the proper law as alternatives, although the law in the United States does not favour the *lex loci actus* to the same extent.[32] There is a lack of certainty in modern systems and among

[28] Falconbridge, *op. cit.*, footnote 5, p. 532.

[29] *Ibid.*, p. 533.

[30] Art. 999. The article is discussed by Batiffol, Traité élémentaire de droit international privé (1959), s. 667, where he states that "Les dispositions à titre gratuit sont soumises pour la forme, comme tous les actes juridiques, à la règle *locus regit actum*". See also Lerebours-Pigeonnière, Droit international privé (7th ed., 1959), s. 485.

[31] Batiffol, *op. cit.*, *ibid.*, s. 286; Niboyet, Traité de droit international privé français, vol. V (1948), s. 1460; Castel, De la forme des actes juridiques et instrumentaires en droit international privé québécois (1957), 35 Can Bar Rev. 654. As to the optional character of *lex loci actus* as embodied in art. 26 of the Italian Civil Code, see Betti, La forma degli atti nel diritte internazionale privato (1960), p. 28 *et seq.* The Spanish Civil Code, art. 11 and the Civil Code of the Argentine, art. 950, embody the *lex loci actus*, Goldschmidt, *op. cit.*, footnote 6, vol. 2, s. 28.

[32] Falconbridge, *op. cit.*, footnote 5, pp. 380-381. According to *Scudder* v. *Union National Bank* (1875), 91 U.S. 406, execution, validity and interpretation of a contract should be governed by the *lex loci contractus* (except for contracts as to land which should be governed by the *lex rei sitae*). It has been suggested that, in general, the validity of property conveyances should be determined by the *lex rei sitae*, and similarly for wills relating to real estate, although the general rule for wills of movables

modern writers as to whether form and substance should be separated and the place of performance used as at least a permissive connecting factor in regard to form. The question of form may be closely linked to and difficult to separate precisely from other issues, notably that of the substantial or intrinsic validity of the act or transaction.

X. *A Liberal Approach.*

There are two situations in relation to validity in general. The first is "inadequacy", and this depends upon the structure of the standard law of the forum. The second may be described as "liberalism". A Ruritanian executes his will in Ruritania, in conformity with the validity conditions of the law of Ruritania. An issue of validity arises before a court of Utopia. The execution of the will was not in conformity with the validity conditions of Utopia. Validity conditions are sometimes of an artificial nature (handed down from the past so that their policy may not now be clearly remembered) and Utopia may feel that justice would not be helped by invalidating the will. To carry the principle of "liberalism" a step further, making the validity conditions of the *locus actus* or some other foreign system exclusive and mandatory, where there is no inadequacy, seems pointless. In the example given, let the Utopian validity conditions be that one witness must be present and subscribe. Suppose that there had been one witness to the execution of the will in Ruritania, but the (different) Ruritanian validity conditions were not observed. Is there any good reason why Utopia should prefer the Ruritanian concept of a valid will to the concept of the same by Utopian standard law, and so declare the will invalid? The crucial policy question in "liberalism" is the importance which the forum attaches to the particular validity condition with which there has been failure to comply. Any principles of "liberalism" would be subject to the exception of public policy, whereby if the conflicts rules produced a result repugnant to the ideas of the forum, it would be disallowed, and the *lex fori* would be substituted.[33]

(where there is no special statute) is the *lex domicilii: Robertson* v. *Pickrell* (1883), 109 U.S. 608; *In re Beaumont* (1907), 65 A. 799, 216 Pa. 350. In *Reilly* v. *Steinhart* (1916), 112 N.E. 468, Cardozo J. distinguished between foreign law affecting basic validity and foreign law affecting the nature of the remedy. The case concerned a Cuban law which left the contract valid but prescribed formalities as a pre-condition for specific performance. The forum was not required to follow the Cuban requirements since they went to remedy and procedure and were not true validity conditions.

[33] As to the operation of the public policy exception, see Baxter, *op. cit.*, footnote 8, at pp. 307-311.

XI. *Interpretation of Contracts.*

Are there circumstances in which the forum should apply foreign principles of interpretation in preference to its own? If X and Y are Italians and the contract is written in Italian, whereas the case has come before a Mexican court, should the interpretation be determined by Italian or Mexican law? The Mexican court will be unfamiliar with Italian rules of interpretation but will be versed in its own rules.

The parties may have expressly asked that the interpretation be made according to a specified system of law, which may not be the *lex fori*. Since the rules of interpretation of contracts in modern jurisdictions do not differ very substantially and are built around the underlying intention, should the law of the forum reasonably provide that a contract can be interpreted by a foreign system, if the parties have expressed a desire that this be so, or where such a desire may be implied from the language used in a written agreement?

We are approaching the general topic of choice of law by the wish of the parties. A contract between X and Y contains a clause that the contract shall be governed by the law of Ruritania. A dispute on the contract arises in a court of Utopia. Should Utopia give a solution by the principles of Ruritanian law in preference to those of Utopian law? The dispute is about the validity of the contract. If the contract is invalid in either jurisdiction, may this not mean that the clause in the contract selecting Ruritanian law is also invalid there? The method may be insecure logically.

Choice of law by the parties

There are those who feel that to allow the parties to select the governing law is to place them above the law.[34] Normally the parties select what they want to do and the law determines the legal consequences of their selection.[35] It may be said that Utopia (the forum) and not the parties, should determine, on the basis of its policy and principles, whether the legal consequences of what X and Y have done ought to follow from the principles of the standard law of Utopia or from those of the law of Ruritania. With the "*lex fori*" approach, the question is whether there is enough reason for not applying the *lex fori*, but, instead, another

[34] See the summary of various arguments in Falconbridge, *op. cit.*, footnote 5, pp. 406-417.

[35] To select an unconnected law suggests an attempt by the parties to evade some law that would otherwise apply, coming rather close to the French doctrine of fraude à la loi. *Cf.* L. de Vos, Les problème des conflits de lois (1947), vol. 2, s. 549 *et seq.*

system proposed by the parties. The sufficient reason must be based on common sense, expediency and justice. Is the desire of the parties *per se* a sufficient reason where the *lex fori* is not inadequate? Is the solution by the chosen law more just, more reasonable or more expedient than the solution by the *lex fori* merely because the parties want it? The important question is not —what law do the parties want, but—what is the most just solution of the dispute, bearing in mind the greater understanding which the forum has of its own law.[36]

Consider the two Italians who expressed their contract in Italian law and where the interpretation has come before a Mexican court. What are the disadvantages of interpretation by Mexican law? In most systems the main rule is that effect should be given to the intention of the parties, and the function of interpretation is to enable the courts to resolve in a systematic manner, doubts regarding the intention. The Mexican Civil Code provides that if the terms of a contract are clear and leave no doubt as to the intention of the parties, the clauses will be construed in their literal sense, unless the words seem contrary to the evident intention of the parties, when the latter shall prevail over the former.[37] A similar principle appears in the Italian Civil Code.[38] Both Codes favour an interpretation that will give some effect to the contract,[39] Both provide for attention to custom in the case of ambiguity.[40] There is a general similarity between the approach of the two systems to interpretation, and there is no significant difference in policy objectives. The document was written in Italian; it will not improve the ambiguity to translate it into Spanish. A court is trying to ascertain what the parties meant by their agreement. Is Mexican law reasonably capable of doing this? We must distinguish here between (a) translation and semantics and (b) rules of law on interpretation. Whether the Mexican court interprets by its own law or by Italian law, it will require a Spanish translation, and presumably it will apply canons of construction and reach a decision on the basis of that translation. Whether Italian or Mexican construction rules are used, the Mexican court will be under the necessity of trying to understand an Italian document and any technical terms of Italian law. The important consideration is not

[36] See Ehrenzweig, *op. cit.*, footnote 20, s. 124, p. 353.
[37] Art. 1851.
[38] "Nell interpretare il contratto si deve indagare quale sia stata la comune intenzione delle parti e non limitarsi al senso letterale delle parole". Art. 1362 (first para.).
[39] Mexican Civil Code, art. 1853; Italian Civil Code, art. 1367.
[40] Mexican Civil Code, art. 1856; Italian Civil Code, art. 1368.

whether Mexican or Italian interpretation law is applied, but that the Mexican court should have available to it sufficient aid from Italian experts—lawyers, interpreters, and the like—to enable it to give a sensible meaning to the Italian document. In regard to the interpretation law in the Civil Codes of the two countries,[41] it would seem preferable for the forum to apply its own rules because it understands them better. On this basis the conflict rule would be the application of the *lex fori* to questions of interpretation, but the standard law of the forum would require that if the contract is in a foreign language or has foreign associations, the court should be given adequate help from experts. The Mexican court, so assisted, would first attempt to ascertain the meaning of the agreement and the intention of the parties.[42] Any resulting ambiguities would then be resolved according to the rules in the Mexican Code. It has been said that since contracts, in contrast to wills and trusts, embody the wishes of at least two parties, the "real and harmonious intention" does not represent a single "objective" meaning "but any (subjective) meaning that on the facts can be imputed to both sides. The foreign origin or operation of a contract can affect this interpretation only as one of the factors that assist us in deciding upon this imputability".[43] A foreign contract may be regarded as a fact and the problem of interpretation as a question of inferring any joint intention upon which that fact was created, rather than one of deductive application of governing rules of law.

But suppose the parties have written a document with the intention that it should be construed according to a particular legal system and even have expressly asked for such an interpretation in the document? Rules of law bearing on this problem may be placed in two classes: (a) subordinate rules, which yield to the intention of the parties and come into play when that intention is ambiguous; (b) dominating rules, which override the intention of the parties because that intention has come up against some strong public policy. The forum should apply its own ideas of public policy and not those of other systems of law, and so the dominating rules will be part of the *lex fori*. Let X make his will with regard to a subordinate rule R_1 of J_1, and put a clause in the will that it be interpreted according to the law of J_1. The forum

[41] Mexican Civil Code, arts. 1851-57; Italian Civil Code, arts. 1362-1371.

[42] *Cf. Chatenay* v. *Brazilian Submarine Telegraph Company*, [1891] 1 Q.B. 79, at p. 84, *per* Lord Esher, M.R.

[43] Ehrenzweig, *op. cit.*, footnote 20, s. 186, p. 492; Corbin, on Contracts (1952), ss. 532-560.

is J_2. We will assume that the issue is only affected by subordinate rules. If R_2 (the appropriate subordinate rule in J_2) is applied, it will yield to the express or implied intention of the testator. If J_2 has the kind of standard law suggested for the Mexican case, a legal expert of J_1 will be brought in to assist the court. The association with J_1 is evidence that the testator intended the distribution to be that produced by R_1. This evidence of intention, if established and given sufficient weight by J_2, will displace the rule R_2, and will determine the distribution. Such matters, then as the use of a foreign language, intention that a foreign rule of construction be applied, are not grounds for the application (as such) of foreign interpretation law in the event of ambiguity; they may well, however, be evidence bearing on the intention of the party or parties as to the desired operation of the agreement or document, and so as to its meaning all to be taken into account by a sophisticated (standard) *lex fori.*

XII. *Enforcement of Contracts.*

So far we have been dealing with validity and interpretation. The only substantial impediment disclosed to the application of the *lex fori* has been "inadequacy" in regard to validity. Another major class of contract problem is concerned with enforcement. The question again is as to the effectiveness of the *lex fori*—whether there are situations in which it would be more just and reasonable for a court of J_2 having jurisdiction in a dispute upon a valid contract (the meaning of which is clear) to work out remedies in terms of a foreign system rather than its own law. Unless the court has jurisdiction, it should not proceed with the case at all. It should not take jurisdiction unless its law is capable of providing and enforcing *some* effective remedy. So—and this is a point that is frequently overlooked—the choice of law problem should only arise in a court which is capable of giving an effective remedy by its own law. The remedies available to the forum may not be the same as those available in another jurisdiction, but it is according to the law of the forum that the judgment will be carried out (subject to any arrangements about reciprocal enforcement). In some of these matters, choice of law seems to be regarded as a kind of substitute for international jurisdiction, with a sentimental leaning towards a "shunting" theory based on scheme four. By this conception, the forum will feel that although the action has been raised in its jurisdiction, the case pertains more closely to another jurisdiction and it would have been more satis-

factory if it had been raised there and decided by that *lex fori.* As it has not been so raised, the next best thing is for the forum to deal with the case as that other jurisdiction would have dealt with it. In a typical contract case, the foreign law might be, for example, the *lex contractus*, the *lex loci solutionis*, or the proper law (meaning the place which appears to have the closest connection with the given contract having regard to all its aspects). The English view is that "the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject-matter and of the surrounding circumstances".[44] It has been said that "where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy".[45]

There are usually two different ways in which a conflict question in contracts may be considered. It may be (a) regarded as a problem as to which system of law should be applied to determine the issue. But it may be regarded (b) as a matter of finding out the scope and operation of the standard law of the forum, that is (i) to prescribe what machinery, aids, facilities and procedures that law may use to discover the meaning of the agreement; (ii) to work out the boundaries of its public policy and whether that public policy affects the contract in question. The point of view (a) is traditional and the nature of (b)(i) has been indicated by the Mexican-Italian example. Because the contract there was between Italians and written in Italian, it was desirable that the *lex fori* should provide that the Mexican court have available to it appropriate expert advice in construing the intention of the parties from a foreign document, which may contain foreign technicalities. This is not an application of foreign law to the issue, but an extension of the usual facilities available to the court.

The nature of (b) (ii) can be discussed against the background

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[44] *Jacobs* v. *Credit Lyonnais* (1884), 12 Q.B.D. 589, at p. 600, *per* Bowen L.J.

[45] *Vita Food Products* v. *Unus Shipping Company*, [1939] A.C. 277, 290. This case states that it was no objection that there was no connection between the transaction and English law, saying, that "Connection with English law is not as a matter of principle essential". See Falconbridge, *op. cit.*, footnote 5, p. 395 *et seq.*, Goldschmidt, *op. cit.*, footnote 6, (2nd ed., 1954), pp. 84-85 for a comparison with Spain, Argentine, and other countries.

of cases such as *Moulis* v. *Owen*[46] or *Story* v. *McKay*.[47] In the former, the defendant gave the plaintiff a cheque in Algiers drawn on an English bank, the cheque being in respect of baccarat debts. The consideration for the cheque was legal by French law but illegal by English law, by reason of section 1 of the Gaming Act, 1835. The court followed *Robinson* v. *Bland*[48] where "Lord Mansfield seems to have based his decision, not on the ground that the statute [The Gaming Act, 1710] applied to gaming in France, but on the special ground that, from the form of the bill, the local law of England must govern the transaction".[49] Fletcher Moulton L.J. in the same case, (dissenting on the point that French law was applicable) thought it must be determined if the cheque came within the purview of the relevant English statutes. He said, "But we must be careful that . . . we do not permit ourselves unconsciously to alter the law which we propose to apply. For instance, suppose there is a statute which makes tobacco growing in England illegal. A cheque for money knowingly given for the purpose of tobacco growing in England would be invalid, inasmuch as it would be for money provided for an illegal object. But an English cheque given for tobacco growing in France would not be invalid, because the English law which has to be applied does not render taobcco growing outside the realm illegal, but only applies to tobacco growing within the realm".[50] In *Story* v. *McKay*, the court was concerned with a bill of exchange. The consideration was illegal in New York and the forum was Ontario. The judgment was that the law of New York applied. The *Moulis* case can be regarded as involving the domestic problem of the interpretation and purview of an English statute. *Story* v. *McKay* is rather the converse. It may be asked—does the forum consider this cheque unenforceable (certain events having taken place in New York), having regard to the fact that the consideration would be illegal by New York law? This would be a question of policy for the forum in the particular situation—a determination of the scope and form of domestic policy rather than choice of law. The two modes of interpretation can be developed into a general difference in approach, as indicated in (b) (ii). The issue may be determined on the basis of one of two questions, each being about the scope and policy of the *lex fori*. They are: (1) does some prohibition or restriction in the *lex fori* extend to the given fact

[46] [1907] 1 K.B. 746. [47] (1888), 15 O.R. 169.
[48] (1760), 1 Wm.Bl. 234, at p. 256, 2 Burr. 1077.
[49] *Moulis* v. *Owen*, *supra*, footnote 46, at p. 754.
[50] *Ibid.*, pp. 757-758.

situation (which involves some events in a foreign country)?; (2) is it part of the policy of the *lex fori* (J_2) to have regard to a prohibition or restriction in country J_1 in framing its decision (certain of the events having taken place in J_1)? An affirmative answer to question (2), in a case where there is no corresponding prohibition or restriction by the standard law of J_2 so that the contract would be valid and able to be enforced by that law, means that J_2 is preferring the policy of J_1 to its own in regard to the legality and enforcement of contracts.

Let X and Y make two contracts, K_1 and K_2, one in J_1 and the other in J_2. The contracts are identical except for the place of making them. By the standard law of J_1 a contract is illegal in the relevant situation, but in J_2, a contract can be enforced in that same situation. Suppose, for simplicity, that the conflict rule of J_2 is to apply the *lex loci contractus* in this type of case. Then the court in J_2 will rule K_1 invalid (although it takes no exception to K_2)—the distinction being due to deference to the thinking of a foreign system. Why has the court drawn such a distinction? The traditional answers are that the contract is orientated to and linked with J_1 by having been made there, or that the parties have chosen the law of J_1, actually, impliedly, or by presumption in favour of the *lex loci contractus*, or some similar reason. But are these grounds compelling enough to justify J_2 in *not* applying its own ideas (in the case of K_1), and in using the policy thinking of another country? It is difficult to see how such an approach is justified. It would appear that this type of problem should be reduced to question (1), and, as indicated, question (1) can be considered as involving the scope of the *lex fori*.

If we do not use "shunting", but prefer a system based on the *lex fori*, with the influence of foreign solutions operating as exceptions, the basic question is whether the wish of the parties for J_1 is *per se* compelling enough to displace the standard solution of the forum in favour of the J_1 solution. According to one view, the parties will always contract in the context of some law, and it is the duty of the court to determine this as part of its inquiry.[51] In case (A) the parties insert a clause, "we agree that this contract will be governed by the law of J_X." In case (B) they express a desire that their contract have the same effect by the *lex fori* as if it had been governed by the law of J_X. In (A), the parties are asking for the law of J_X, whereas in the second, they are asking that the *lex fori* give effect to their intention. Is it not an excess of refinement to say that one is allowable but not the other?

[51] Rabel, *op. cit.*, footnote 6, vol. 2 (1947), pp. 364-365.

The broad areas of the law of contracts are (i) validity and vitiating factors, for instance capacity, formality, mutual consent, fraud and error, illegality; and (ii) content and operation, for instance interpretation, remedies for non-performance. The validity of a contract may depend (in any legal system) to a substantial extent, on whether there has been *consensus ad idem*. But *consensus* is not the only element in the formation of a contract, for example, in the systems which use the doctrine of consideration or *causa*. In neither the common-law nor civil-law systems (in standard law) are the rules of validity and vitiating factors left to be determined by the parties as they see fit. Once the contract has been determined to be valid, the intentions of the parties assume a special importance in discovering the content. The idea of freedom of contract can be embraced too enthusiastically. There is confusion between freedom of contract and autonomy of the parties.[52] The essence of a contract may be *consensus* but (in standard law) the parties' wishes are not always paramount. Similarity between (A) and (B) (in the preceding paragraph) has been exaggerated by the fallacious way in which (B) has been stated. In considering (B), suppose that the issue falls into the area of validity. The forum J_f provides by its standard law, a set C_f of validity conditions. The conditions in J_X are represented by a set C_X. If (B) is applied by the forum, the effect is that the parties say—"please determine the validity of our contract, and because there is such a clause in our agreement, you must do so by C_X and not C_f". The elements of C_X and C_f may or may not be of the kind that are governed by the will of the parties. They may not depend upon whether there has been *consensus*—but upon an external requirement such as consideration. It is one thing to argue (i) that the nature of the *consensus*, and questions associated with it, should be ruled by the will of the parties, and (ii) that other questions should also be ruled by appropriate elements of C_X rather than those of C_f. Let the sub-set C'_X contain only elements of C_X associated with the determination of the existence and content of the *consensus*. The contract contains a clause that such determina-

[52] "Il est certes choquant de penser que la solution jurisprudentielle dans le sens généralement reçu du choix par les parties de la loi applicable signiferait que l'empire de chaque loi dépendrait de la volonté des parties; une pareille vue semble peu conciliable avec la notion que la loi exerce une autorité assortie de sanctions coercitives; prétendre que le délinquant est puni parce qu'il a consenti à l'être en acceptant l'autorité de la loi manifeste un grand respect de la liberté et une méconnaissance des réalities psychologiques les plus élémentaires." Batiffol, Aspects philosophiques du droit international privé (1956), pp. 83-84: Schnitzer, La loi applicable aux contrats (1955), 44 Rev. crit. de droit int. privé 459.

tion shall be made according to C'_X (whether or not this is the *lex fori*). According to argument (i) the existence and content of the *consensus* involves an inquiry as to the intention of the parties and it is part of the parties' intention that the inquiry will be based upon the rules C'_X. To use the rules of the *lex fori* would be to neglect the intention of the parties. The proposition (B) should be restricted to the argument (i), and a theory of autonomy of the will of the parties in contracts should be limited to appropriate issues.

But is not argument (i) over-sophisticated? Are we not here concerned with a situation where the parties have expressed their intentions as to the effect of their contract in a particular form? Instead of elaborating the desired effects with regard to a set of conditions C_X, they have inserted a clause that they wish the contract "to be governed by J_X". This clause need not be regarded as indicating allegiance to "shunting", but simply as one indication (for there may be others) of what the parties intended—an indication expressed in a specialized way. If the issue is one, which by the *lex fori*, is governed by mutual intention, then the clause ought to be taken into account as a special factor in the proper discovery of that intention. The normal reason for the insertion of a choice of law clause is to counteract the complexities and uncertainties of traditional "shunting" conceptualism.[53] There is as much a desire to remove doubts as to which solutions govern, as to express a preference for one system rather than another. The theories of "centre of gravity" and "points de rattachement" are based on the concept that there are connected with any contract a number of relevant factors, and these are valued as to importance. The system which has the greatest weight (so calculated) is called the proper law. The intentions of the parties may exert influence in various ways and may be the basis upon which factors are created. It has been said that "on echappe à une loi en changeant de nationalité ou de domicile, en déplacant un meuble, et, de même, en contractant à l'étranger; en admettant que la loi détermine d'autorité son champ d'application, elle le fait en se référant à des circonstances qu'il est au pouvoir des parties de modifier, l'empire territorial et personnel des lois dépend donc directement ou indirectement de la volonté des parties".[54]

[53] "Parties wanting to secure their transaction against the possible legal intricacies of the unknown governing law, would be made more helpless by the assertion popular in the literature that they cannot escape imperative rules of the governing law by agreeing on the applicable law." Rabel, *op. cit.*, footnote 51, p. 359. For a historical description of the development of the theory of autonomy of the will in French law see Niboyet, *op. cit.*, footnote 31, ss. 1389-1392.

[54] Batiffol, *op. cit.*, footnote 52, p. 84.

XIII. *The Choice of the Parties as a Connecting Factor.*

The intention of the parties may itself be regarded as a connecting factor, to be added to other factors such as *situs*, nationality, domicile, to form the class of potential factors.[55] The desirable characteristic of a connecting factor is that it should lead only to one system of law. The parties' choice can do this. The English authorities indicate that the parties choice should over-ride any other potential choice of law factor, but the inclusion of it simply as one of the class of potential factors would be a middle course between this view—of pure autonomy—and the exclusion of the parties' choice altogether. If the centre of gravity theory were then applied, the law selected by the parties would only be the applicable law where the contract was also considered by the court to be most closely connected with that law.

The difficulty is to find a basis of preference (other than statistical). How are we to evaluate the respective importance of such diverse elements as, (i) the place where the subject matter is located, (ii) the nationality of the seller, (iii) the law selected by the parties in a written agreement, (iv) the place where that agreement was made, (v) the place where the price is to be paid, (vi) the place where the subject matter is to be delivered. How can we say that it is better or worse justice to apply the law of one rather than another. If we are to make value judgments on the class of potential connecting factors *inter se*, we will require a standard of value. When we are concerned with a number of things, the work may be easier to organize, if we use a standard, but the problem is still one of finding a good reason for preferring one thing to another.[56] Can we make a satisfying comparison, say, between the place where a document was signed and a clause in the document that a certain law shall apply? A study of logical relationships will not supply the answer.

In an earlier article, I suggested three general criteria for a system of recognition rules in family law.[57] They are: (A) simplicity and efficiency in the production of solutions; (B) fairness and justice between the parties; (C) public policy in the prevention of

[55] "La norma indirecta del juez enfoca en sú tipo legal el problema de los contratos con elementos extranjeros, y declara en su consecuencia jurídica que es aplicable el Derecho elegido por las partes; la autonomía de partes, lejos de ser una misteriosa *causa sui*, constituye el punto de connexión en una norma indirecta de un Derecho Internacional Privado positivo." Goldschmidt, *op. cit.*, footnote 6, vol. II, s. 21.

[56] *Cf.* Baxter, Plato and Modern Justice (1962), 17 Giornale di Metafisica 135.

[57] *Op. cit.*, footnote 8, at p. 348.

solutions seriously out of harmony with the current beliefs and way of life of the forum. These are to be applied on the basis that class (B) overrides class (A), and class (C) overrides both class (A) and class (B). As regards (A), it will usually be simpler and more efficient for the forum to use its own law, procedure and remedies. This is subject (as already discussed) to the exception of "inadequacy". In regard to class (C), it is the public policy of the forum that concerns us, and if public policy operates, the traditional result of this is that the foreign law is displaced by the *lex fori*.[58]

XIV. *The Choice of the Parties as an Overriding Factor.*

Instead of saying that the intention of the parties in a contract is one of the possible connecting factors, it might be treated as a substitute (in that area) for choice of law rules.[59] If, however, the intention is not expressed or cannot be inferred, resort must be had to some other "shunting" element if the problem is to be solved, or presumptions must be introduced. This is equivalent to giving the will of the parties the status of an overriding connecting factor. Are there reasons why intention should be accorded a dominant position vis-à-vis other potential factors? It is sometimes said that it is the uncertainty of conflict rules on contracts that has directed interest to party autonomy and has induced the practice of expressing a choice of law in contract documents. But intention is not always easy to determine. If not express nor able to be implied from relevant facts, but only derivable from presumptions—the choice may be derived from fictional intention. Party autonomy has less certainty in working out what the selection is, than say, the place of contracting or the place of performance, or the forum, all of which may be more precise than the intention of the parties. Intention also has the technical weakness (already indicated) that the very issue may be whether the alleged contract can be enforced. If a potential connecting factor is one which is always capable (or at least normally capable) of allotting the problem to a single system of law, then in "shunting" theory, there will frequently

[58] *Ibid.*, at pp. 307-308.

[59] Rabel, *op. cit.*, footnote 51, states: "All versions of a predestinated law have been abandoned by the present jurisprudence of mercantile countries. The English view is beyond doubt. French and German courts definitely apply the law upon which the parties agree, with all its implications, and do not apply another law solely because it would be applicable in the absence of a party intention." (p. 399) And he adds: "Contrary to many assertions, the leading conflicts laws do not recognize any imperative rules governing a priori. Equally, the often repeated general postulate that the parties can select a law only if it has a substantial connection with the contract, has proved a fallacious idea." (p. 427).

be a number of such connecting factors. It will normally be more efficient to apply the *lex fori*, because it is best understood and its remedies are controlled by the forum. As for public policy—the application of this in conflict of laws is to substitute the *lex fori* for foreign law. Can it be said that one system will produce greater justice between the parties than another if it is assumed that all systems are, *prima facie*, equally capable of a just solution and that no comparative study of the justice of end-solutions should be undertaken. This situation would be a basic objection to "shunting" for a hypothetical legislator devising a new conflict code for Ruritania, uninhibited by knowledge of the historical development of legal systems. But we cannot ignore history and the existence of a current body of rules and principles (in the forum and in other countries) however erroneously conceived we may think them. It is not an absolute question of what is the most reasonable solution of a particular dispute:—but what is the most reasonable solution relative to the fact that there is present law on this issue and that this law is part of a historical development.

XV. *Uniformity of Laws.*

Is greater uniformity of conflict rules among the N systems a desirable objective? Let all the others adopt the solutions of N_1 in a particular range of problems. The solution of a relevant problem in N_2 by this method will not necessarily be fairer and more reasonable than if N_2 had applied the law which it had before the uniformity arrangement. If we assume that all N systems are *prima facie* equally fair and reasonable, the argument in favour of uniformity is more compelling. Differences in legal systems would then be examples of idiosyncrasy. But the existing systems are not equally fair and reasonable. Uniformity among the N's will not *necessarily* improve the law of a specific country in the group. Are there advantages in uniformity *per se*?

An interest in the future development of uniformity may intensify the study of internal systems. This is a useful by-product. Comparative research may be stimulated, thus bringing into focus a cross-section of answers to the given problem, and widening the views of those concerned. But to argue for uniformity on this ground alone, would be coming close to saying that the by-product justifies the main article.

Uniformity in regard to title and status

Both title and status are associated with legal attributes of a person in a way that is usually more permanent than the general

class of situation where he will have a cause of action for some reason or other.[60] A person (physical or abstract) may be regarded as having at any time a juridical matrix of attributes determining his legal rights, privileges, obligations, and so on. This matrix can be distinguished from an infringement of a right giving rise to a cause of action. Is there an argument for the uniformity of the juridical matrix among the N jurisdictions to avoid the situation where X is married in J_p and unmarried in J_q; the owner of a certain *res* in J_r and not its owner in J_s and so on? These limping situations decrease the reputation of the law for reason and consistency, in the eyes of laymen, businessmen owning property and holding securities, or those whose legitimacy or matrimonial status is not constant over the jurisdictions: perhaps a title holder in J_1, an unsecured creditor in J_2, a respected citizen in J_3, and a bastard in J_4,—the law can impose a complex destiny. These matters, however, are not properly questions of conflict but of uniformity of laws.

Uniformity may relate to: (i) standard law, or (ii) conflict rules. Let two rules of standard law in J_p and J_q, be the same. What does this imply? The roots of legal principles lie deep in any system, and the chances of identity are small. This is also true of conflict rules but the impact of the distinction is not the same. If J_f is the forum and its conflict rule on a certain issue leads to J_p, it will not be relevant that $l_p = l_q$ on this issue. It will be relevant, however, if there is an applicable uniformity between l_p and l_f. We are concerned with the final disposal of the issue (not merely with "shunting") and so there is need to examine the uniformity involved—the meaning of "same" in the context; because two rules, looking the same *ex facie*, may exist in a different juridical atmosphere.[61] Let there be uniformity between two conflict rules such that $l_{cp} = l_{cq}$. Then, subject to variations of interpretation, both rules indicate the same determining law. Suppose that the rule both in J_p and J_q is that the title to movables is to be determined by the *lex situs*, and the goods at the relevant time are in J_s. In this area, there should be a probability that end-solutions in J_p and J_q will be the same, or will purport to be applications of

[60] *Cf.* the distinction made by Roubier, Les prérogatives juridiques (1960), 5 Archiv. de Phil. du Droit 66, between "celui qui peut se prévaloir d'un droit subjectif (droit de propriété, droit de succession, droit d'auteur, etc." and "celui qui est admis à exercer une action en justice . . .".

[61] This problem is often dealt with by presuming that the foreign law is the same as the law of the forum unless the contrary is proved, and if this presumption holds, then proceeding by way of the *lex fori*. By this device, the courts frequently avoid the complexities of the strict theory of shunting.

the same principles, because the solutions favoured by l_s are copied by both J_p and J_q. The chance of uniformity of end-solutions seems to be greater by uniformity of conflict rules than by uniformity of standard rules, in areas to which conflict rules apply. The reason is that (i) where $l_{cp} = l_{cq}$ (on the relevant point), no further uniformity is required: (ii) conflicts rules are much smaller in number than standard rules, and so (in the relevant areas) a higher proportion of final uniformity may be achieved more easily through the gateway of uniformity of conflict rules, than by seeking uniformity in the rules of standard law. This kind of motivation has been helped by the influence of certain systems, for instance English, French, German, Italian law; and the attraction of concepts such as nationality, domicile, *situs*. As a result, there is some uniformity of conflict rules in existing systems. This has been caused by the historical development of private international law, although some of the productive forces may appear misguided and unreasonable under a searching analysis *de novo*. The main sin of conflict of laws—and choice of law in particular—is an uncritical attitude to manipulation of abstract ideas, and a shielding of the end-solution from value judgments on justice. But they exist as part of the fabric, which possesses a measure of uniformity. If uniformity is desirable, we should try to turn the historical situation to our advantage.

Some choice of law rules and connecting factors are fairly generally accepted—for example, *lex rei sitae* in property law, and *lex loci actus* in regard to formal validity. Whatever may have been the reasons for the acceptance—good or bad—such uniformity should not be ignored in considering a desirable structure for a modern system of conflict of laws because this cannot be made from a *tabula rasa*. Personal law, in the form of nationality or domicile, has at least a superficial uniformity, although, as indicated, there is a good deal of underlying difference between systems; and possible difficulties of application in non-unilateral situations.

XVI. *A Prolegomenon to New Principles of Choice of Law.*

It is my opinion that the foundation principle for a new set of rules for choice of law should be that the forum will apply the standard law of the forum to any issue coming before its courts, unless there is a good reason for applying a (foreign) solution, different from the standard law. The treatment of the *lex fori* as a basic rule of choice of law has been discussed by Ehrenzweig, both from the historical point of view and by a large citation of cases

and authorities, and the reader is referred to this material in connection with the present discussion.[62] The justification of the *lex fori* as a basic rule rests on the assumption that the N jurisdictions will operate reasonable principles for the taking of jurisdiction over disputes submitted to them. By reasonable principles, is meant that the forum will limit itself to those disputes where a judgment given by a court of the forum can be enforced in a sensible and effective manner, for instance against a party, by operating on his assets within the forum, or by operating on the subject matter under jurisdictional power. This qualification restricts the work of the courts of the forum to the formulation of *effective* solutions. So, any actual solution will be both effective and just, at least by the prevailing juridical view for the time being. In most instances, a solution by the standard law of the forum will be regarded as just and reasonable: but there may be situations where this will not be so, and where the forum will consider it proper not to apply its standard law, but instead to produce a special solution. This means that the subject traditionally called choice of law resolves itself, in the present analysis, into a study of a group of special principles, and the reasons (based on convenience, common sense and fairness) which justify the court in preferring such principles. The special principles l_{df} (excluded by definition from the set of standard law principles l_{sf}) will be constructed by copying the standard rules and solutions of other jurisdictions. This process may be indicated by putting $l_{df} = (l_{sp})\ f$ (where $(l_{sp})f$ indicates that the standard law of a foreign jurisdictation P is being applied by the forum). So the total set of legal rules in the forum, J_f is extended from l_{sf} to $l_{sf} + (l_{sp})f$.

In what kinds of situation should a forum apply $(l_{sp})f$ in preference to its own standard law? Where the standard law is "inadequate", it is illogical to apply that law. The court of the forum in such a case, will imitate the decision which would probably have been given by the foreign jurisdiction P.

In addition to "inadequacy", uniformity is an important factor. It is not suggested that uniformity is an end that should override other considerations. The question is whether it has sufficient weight to displace, for example, the *a priori* advantage of the *lex fori* as the law well known to the court. Uniformity should only operate in this way where it already exists (or there is a good chance of stimulating it) over a significant number of the N systems.

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[62] See in particular Ehrenzweig, *op. cit.*, footnote 20, Ch. 4, on the general theory of choice of law.

Many countries use the *lex situs* as a fundamental choice of law principle in property questions. An opportunity exists here to take advantage of history. A modification and rationalization of existing rules which would lead to a more understandable and coherent system, would be to define *situs*, not as the location of an object, but as the place where property rights can be enjoyed or made effective. It would not require great concessions by most countries, to conform with such a principle. If it were followed, limping titles would be virtually eliminated and the forum would have the rule that its solutions (on the applicable class of problem) would imitate probable solutions by the standard law of the *situs* at the critical time.

Another conflict principle which has wide acceptance is the application of the personal law to unilateral problems where the subject matter of the issue may be located in more than one jurisdiction at a given moment of time. Use of a connecting factor based on the geographical location of assets may lead to plurality of solutions for different parts of the estate. A unified solution can be obtained for instance (a) by applying the *lex fori*; (b) by applying a law depending not on the location of assets but upon qualities pertaining to the deceased such as the location of his home or of his national allegiance; or (c) by applying the law of the *situs* of the preponderance of assets. In the case of (a) there may be the inconvenience of actions in different jurisdictions relating to the assets of the same intestate, while in (b) there may be doubts and different views between jurisdictions as to what is the personal law. Some favour nationality and some domicile and there are various interpretations of these, particularly of domicile.

I have constructed three general classes of exception to the basic *lex fori.* These three classes may be labelled as (i) "inadequacy"; (ii) "situs"; (iii) "unilateral problem with multi-location". In these classes there is a good comprehensive reason for departing from the standard law of the forum and for making a supplementary set of solutions after the pattern of a foreign system. There may exist other situations where the standard law of the forum should not be applied, but their existence must be separately justified. Unless this can be done, the sensible approach is to apply the standard law of the forum.This whole approach, based on the *lex fori* as fundamental system, provides a simple and adequate prolegomenon for a new modern system of private international law—simpler to understand and apply, and more logical and self-consistent, than one based on "shunting" technique.